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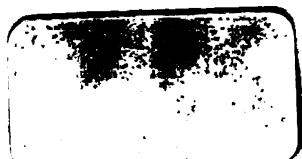
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AN
ANALYTICAL
DIGESTED INDEX.
TO THE
TERM REPORTS,
AND OTHERS;
DURING THE REIGN OF GEO. III.

VOL. II.

A

AN
ANALYTICAL
DIGESTED INDEX
TO THE
TERM REPORTS,
AND OTHERS;
CONTAINING ALL THE POINTS OF LAW
Argued and Determined
IN
THE COURTS OF
KING'S BENCH, COMMON PLEAS,
AND
EXCHEQUER,
DURING THE REIGN OF GEO. III.

CONTAINED IN THE REPORTS OF

ANSTRUTHER.
H. BLACKSTONE.
W. BLACKSTONE.
BOSANQUET & FULLER.
BURROW.
COWPER.
DOUGLAS.

DURNFORD & EAST.
EAST.
FORREST.
LOFFT.
MARSHALL.
MAULE & SELWYN.
B. MOORE.

NEW REPORTS.
PRICE.
SMITH. .
TAUNTON.
WIGHTWICK.
WILSON.

With Tables of Reference, Titles, Names of Cases, and Statutes.

IN TWO VOLUMES.

VOL. II.

BY ANTHONY HAMMOND, Esq.

OF THE INNER TEMPLE.

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- (a) *In the case of a civil arrest.*

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and before the arrest.*

An action does not lie for neglecting to
countermand a writ properly sued out,
after payment of the debt, in consequence
of which the plaintiff was arrested, without
an averment and proof of malice. Page

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v. *Wiple*, 3 East, 314; *Scheibel v. Fairbain*, 1 B. & P. 388.

(c) *In relation to the case where the debt was paid before the process issued.*

Evidence of suing out a writ, and arresting a party thereon, after the debt has been discharged, and a receipt given, will not maintain an action for a malicious arrest, where actual malice is not proved, and the facts of the case preclude any inference of malice. *Gibson v. Chaters*, 2 B. & P. 129.

(d) *In relation to the case where the original suit was groundless in part.*

1. If in a prosecution some of the charges are groundless, an action, all essentials concurring, lies for these, though the other charges were well founded. *Rex v. Prosser*, 1 T. R. 533.

2. An action for a malicious prosecution for perjury may be maintained, if any of the assignments of perjury were malicious, and without reasonable cause, though some are well founded. *Reed v. Taylor*, 4 Taunt. 616.

(e) *Whether where the original suit failed on the ground of form.*

To support an action for a malicious prosecution, it is immaterial in what way the prosecution was terminated; as whether the plaintiff was acquitted on the merits, or on the ground of variance. *Wicks v. Fentham*, 4 T. R. 247.

II. ON THE ANALOGY OF THE ACTION FOR, WITH TRESPASS.

There is no similitude or analogy between an action of trespass, and an action for malicious prosecution. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. The other is for a prosecution which, upon the stating of it, is manifestly legal. *Johnstone v. Sutton*, in error, 1 T. R. 544, 784.

III. ON THE PLEADINGS IN.

(a) *The declaration.*

(a 1) *Relative to the averment of the termination of the original suit,—in the case of a malicious commitment.*

1. In actions for malicious prosecution or arrest, it must be shewn that the original suit is terminated, otherwise there

might be two contradictory verdicts. *Fisher v. Bristow*, Dougl. 215. The rule holds in the case of a malicious commitment under the warrant of a magistrate, upon a charge of felony, since that is but a preparatory step in order to trial. *Morgan v. Hughes*, 2 T. R. 225.

2. In an action for a malicious prosecution, by commitment under a magistrate's warrant upon a charge of felony, the averment that the plaintiff was discharged from his imprisonment, without disclosing upon what grounds, does not sufficiently shew that the prosecution is at an end, since he might have been discharged, and the prosecution still be carried on. To say that he was acquitted is sufficient, since that means by the verdict of a jury. *Morgan v. Hughes*, 2 T. R. 225.

(a 2) *Where the original suit was coram non iudice.*

In case for a malicious arrest in an inferior court that had no jurisdiction, an averment that defendant knew that the court had no jurisdiction, seems unnecessary. *Goslin v. Wilcock*, 2 Wils. 302.

IV. ON THE EVIDENCE IN.

(a) *On the proof by the record of acquittal.*

1. In case for a malicious prosecution for felony, a copy of the record and acquittal must be proved. *Secus*, if only for a misdemeanour. *Morrison v. Kelly*, 1 Blk. 358.

2. In an action for a malicious prosecution for felony, the original record, or a copy, must be admitted in evidence, however obtained; though, if surreptitiously, proceedings will be stayed. *Legatt v. Tollervey*, 14 East, 302.

(b) *On the proof of a malicious motive.*

(b 1) *General rule.*

In case for malicious prosecution, the plaintiff must prove malice, express or implied, and the want of probable cause. *Farmer v. Darling*, 4 Burr. 1971.

(b 2) *Particular instances.*

1. From the want of probable cause, malice may be, and usually is, implied. *Johnstone v. Sutton*, in error, 1 T. R. 545, 784.

2. Proof of an acquittal, from want of prosecution, is not presumptive proof of malice, in an action for a malicious pro-

secution. *Purcell v. Macnamara*, 9 East, 361.

3. A nonpross affords no inference of malice. *Sinclair v. Eldred*, 4 Taunt. 7.

4. An action for malicious prosecution, in indicting the plaintiff for an assault and battery, where the bill has not been found, cannot be supported without evidence of express malice, as well as of the want of probable cause. *Byne v. Moore*, 1 Mars. 12; 5 Taunt. 187.

(c) *On the proof of the want of probable cause.*

The essential ground of an action for malicious prosecution is, that a legal prosecution was carried on *without a probable cause*. Every other allegation may be implied from this; but this must be substantially and expressly proved, and cannot be implied. *Johnstone v. Sutton*, in error, 1 T. R. 544, 545, 784.

V. ON THE MEASURE OF DAMAGES IN.

(a) *In relation to the expense of extra costs.*

The expense of extra costs is not recoverable in an action for a malicious arrest. *Sinclair v. Eldred*, 4 Taunt. 7.

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I. RELATIVE TO THE TIME FOR WORKING THE GRAIN.

(a) *How computed.*

The average number of days necessary

for working the grain intended for malt, between the steeping and drying, is computed by the Excise at sixteen. *Rex v. Grimwood*, 1 Price, 369.

(b) *Evidence relative to.*

Proof of malt not having required so long a space of time in working and passing through the floors, from the cistern to the kiln, as it had been entered as having taken for that purpose, will, in some cases, be considered *prima facie* evidence of fraud; and duties are recoverable for the amount of so much grain malted as would be commensurate with such excess of time, as if so much of the duty were in arrears. *Rex v. Grimwood*, 1 Price, 369.

II. RELATIVE TO SUITS FOR DUTIES ON.

(a) *Limitation of.*

The restrictive proviso in the 12 Ann, c. 2, limiting the right of the crown to proceed for arrears of duties on malt, to a period of five years previous to the commencement of suit, is not now in effect, not having been re-enacted by any of the subsequent malt acts referring to that statute. *The Attorney General v. Newman*, 1 Price, 438.

III. OF CONVICTIONS RELATIVE TO.

(a) *Evidence that defendant was a maltster.*

A conviction, stating in the evidence that the witness, being an officer of Excise, went and surveyed the malt-house of the defendant on a certain day, in his presence, which is not contradicted, is sufficient *prima facie* evidence that the defendant was then a maltster, or maker of malt, within 42 Geo. III, c. 38; *Rex v. Crispe*, 3 Smith, 377; 7 East, 389.

(b) *On the appeal from.*

No appeal lies to the sessions from a conviction by two justices, for an offence under 42 Geo. III, c. 38, s. 30; *Rex v. Skone*, 2 Smith, 643; 6 East, 514.

IV. OF STATUTES RELATIVE TO.

(a) 42 Geo. III, c. 38,—*whether repealed.*

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I. NATURE OF THE WRIT.

(a) *Whether demandable of right.*

It is discretionary in the court to grant or refuse a *mandamus*; and it is never granted without reasons are assigned. *Rex v. The Bishop of Chester*, 1 T. R. 396; *Rex v. The Mayor and Aldermen of London*, Id. 423; *Rex v. Bishop of Ely*, 2 T. R. 290; *Rex v. Commissioners of Excise*, 2 T. R. 385.

II. WHEN IT WILL LIE.

(a) *General rules.*

1. There must in all cases be a specific legal right; as well as the want of a specific legal remedy, in order to found an application for a *mandamus*. *Rex v. The Archbishop of Canterbury*, 8 East, 213.

2. The general rule is, that if there be another specific legal remedy, the court will refuse to interfere by *mandamus*. An indictment does not appear to be a remedy within the import of this rule, being a proceeding in *pœnam*, and not restoring the right withheld. *Semb.* therefore, that a *mandamus* will lie to commissioners under an inclosure act, to compel obedience to an order of the sessions, made on an appeal against commissioners, notwithstanding indictment lies. *Rex v. Commissioners of Doan, in Cumberland Inclosure*, 2 M. & S. 80.

3. It is no answer to an application for a *mandamus*, that the party has a remedy in equity. *Rex v. The Marquis of Stafford and Gifford*, 3 T. R. 646.

(b) *For a copyhold.*

1. A *mandamus* may be granted to admit to a copyhold estate, the person who appears to have the legal estate, without regard to his equity. *Rex v. Coggan*, 2 Smith, 417; 6 East, 431.

2. It is not a rule, that a *mandamus* to the lord of a manor, on behalf of a copyhold tenant, will only be granted where a suit is depending. Any other case of reasonable necessity is sufficient. *Rex v. Tower*, 4 M. & S. 162.

3. A *mandamus* to admit to a copyhold lies, though no fine has been paid, since none is due until admittance. *Rex v. The Lord and Steward of the Manor of Hendon*, 2 T. R. 484.

(c) *For offices in general.*

1. It seems that wherever a party is improperly suspended, or removed from an office, whether its duties are public or private, if he has a certain term therein, and there are profits annexed to it, a *mandamus* lies to restore him, provided he has no other specific remedy. Hence, it lies for the office of clerk of the bridge-house estates in London. *Rex v. The Mayor, &c. of London*, 2 T. R. 177. See *Lofft*, 551.

2. There is a great difference between an application for a *mandamus* to admit and one to restore to an office. The former is granted to try the right, since without a *mandamus* there is no legal remedy. But where a party has been in possession, he may try his right by an action for the profits; and therefore a *mandamus* to restore will not be granted, unless facts are stated, whence the court may infer a title in the party. *Rex v. Jotham*, 3 T. R. 575.

(d) *For corporate offices.*

1. A *mandamus* lies to a mayor, &c. to fill up vacancies in a corporation, notwithstanding a *quo warranto* information, disputing his title, is pending against him, unless, perhaps, where the party applying for the *mandamus* is the prosecutor therein. *Rex v. The Mayor, &c. of Grampond*, 6 T. R. 301.

2. A *mandamus* will be granted after an election which is colourable and clearly void. *Rex v. Cambridge Corporation*, 4 Burr. 2008.

(e) *For a recordership.*

1. A *mandamus* will lie to restore a recorder. *Rex v. Wells Corporation*, 4 Burr. 1999.

2. A motion for a *mandamus* to affix the corporate seal to the certificate of the election to the office of recorder, on an affidavit that he had the majority of legal votes at the election, is,—like one to swear in a corporator,—of course. *Rex v. The Corporation of York*, 4 T. R. 699.

(f) *To a college.*

Mandamus granted to compel the warden of Wadham college to affix the common seal of the college to an answer of the fellows, &c. in chancery, contrary to his own separate answer put in. *Rex v. Windham*, Cowp. 377.

(g) *For an university high stewardship.*

A *mandamus* lies to the keepers of the common seal of the university of Cambridge, commanding them to put it to the instrument of appointment of their high steward, pursuant to a grace passed in senate. *Rex v. Vice Chancellor of Cambridge*, 3 Burr. 1645; 1 Blk. 547.

(h) *For a lectureship.*

1. A *mandamus* to the archbishop and bishop to license to a lectureship, or shew cause, &c. lies, if it appear that the candidate has a right. *Rex v. The Bishop of London*, 13 East, 420, n.; 427. See *Rex v. The Archbishop of Canterbury and the Bishop of London*, 15 East, 117.

2. A refusal by the archbishop must appear, before the court will entertain a motion for a *mandamus* to the bishop to license to a lectureship, which he has refused to do on the alleged ground of unfitness. *Rex v. Bishop of London*, 13 East, 419.

(i) *For a parish clerkship.*

The office of parish clerk is a temporal office; and the clerk, though appointed by the minister, if unlawfully displaced, may have a *mandamus* to be reinstated. *Rex v. Warren*, Cowp. 370; *Rex v. St. Andrew's, Soho*, 3 Burr. 1878; Loft. 434.

(k) *For a dissenting ministership.*

1. A *mandamus* may be granted to the trustees of a meeting-house to admit a dissenting teacher duly elected. *Rex v. Barker*, 3 Burr. 1265; 1 Blk. 300, 352.

2. A *mandamus* lies to admit or restore to the ministry of an endowed dissenting meeting-house. *Rex v. Jotham*, 3 T. R. 575.

(l) *For a clerkship to the commissioners of the land-tax.*

A *mandamus* is grantable where there is no other specific legal remedy. Therefore it may be had by a candidate for the office of clerk to the commissioners of the land-tax in their department, for the rates and duties on windows, houses and lights, directing the commissioners to proceed to an election. *Rex v. The Commissioners of the Land-tax for St. Martin in the Fields, Westminster*, 1 T. R. 148.

(m) *To arbitrators under a Canal Act.*

Mandamus to arbitrators under a Canal Act to appoint an umpire. *Rex v. Goodrich*, 3 Smith, 388.

(n) *In relation to a church rate.*

Though a *mandamus* to churchwardens, &c. to make a church rate will not be granted, that being a matter of ecclesiastical cognizance; yet, it will be granted to compel them to assemble and determine whether a rate should be made. *Rex v. Churchwardens, &c. of St. Margaret and of St. John, Westminster*, 4 M. & S. 250.

(o) *For the registration of a meeting-house.*

A *mandamus* will lie to register and certify a dissenting meeting-house. *Rex v. Justices of Derbyshire*, 4 Burr. 1991; 1 Blk. 606.

(p) *For administration.*

A *mandamus* for administration to the next of kin may be granted, notwithstanding a suit depending, if his consanguinity be not denied. *Rex v. Hay*, 4 Burr. 2295; 1 Blk. 640.

III. WHEN IT WILL NOT LIE.

(a) *General rules.*

1. A *mandamus* will be granted to enforce a legal only, not an equitable right, as a trust, since over the latter a court of law has no jurisdiction. *Rex v. The*

Marquis of Stafford and Gifford, 3 T. R. 646.

2. A *mandamus* will not be granted where there is another specific remedy; as by information in nature of *quo warranto*. Not, therefore, where one of two candidates for a corporate office having been elected and inducted, the other complains that himself ought to have been elected. *Rex v. The Mayor of Colchester*, 2 T. R. 259.

3. It is a general rule that a *mandamus* will not be granted, where the party applying for it has some other specific legal remedy; not therefore where he may maintain *quare impedit*. Exceptions to this rule have been allowed, where though the party has had another remedy, yet it has now become an obsolete proceeding; thus where it has been an assize. *Rex v. The Bishop of Chester*, 1 T. R. 396.

4. *Mandamus* will not be granted to do that which is likely to be done without it by consent. *Lofft*. 148.

(b) *In relation to the end proposed.*

(b 1) *To execute part of a statutable power.*

A *mandamus* will not lie to execute one part of a power granted by act of parliament. *Rex v. Birmingham Canal Navigation*, 2 Blk. 708.

(b 2) *To the county treasurer, to reimburse constables for passing vagabonds.*

A *mandamus* will not lie to the treasurer of a county to reimburse constables monies expended for conveying rogues, vagabonds, and disorderly persons. *Rex v. Erle*, 2 Burr. 1197.

(b 3) *For offices in general,—and herein, of corporate offices.*

1. A *mandamus* will not be granted to restore a party to an office from which he has been irregularly suspended, if it appear that there were sufficient grounds for suspension. *Rex v. The Mayor, &c. of London*, 2 T. R. 177.

2. A *mandamus* to restore will not be granted where it is confessed that the removal was just, though no notice was given. *Rex v. Azbridge Corporation*, Comp. 523.

3. The court will not grant a *mandamus* in opposition to a long-continued usage, where the words of a charter are in

any degree doubtful, especially if there is another remedy open. *Rex v. The Corporation of Chester*, 1 M. & S. 101.

(b 4) *For an ecclesiastical advocate.*

A *mandamus* does not lie to the archbishop of Canterbury touching the admission of one as advocate in the Court of Arches. *Rex v. The Archbishop of Canterbury*, 8 East, 213.

(b 5) *For a vestry clerkship.*

The office of vestry clerk is of a private nature, and is not permanent; therefore, a *mandamus* does not lie to admit to it. *Rex v. The Churchwardens of Croydon*, 5 T. R. 713.

(b 6) *For a church rate.*

1. The repairs of a church are a subject purely of ecclesiastical jurisdiction; hence, a *mandamus* for a rate for the repairs does not lie. *Rex v. The Churchwardens of St. Peter's, Thetford*, 5 T. R. 364.

2. A *mandamus* to make a rate for the repairs of a church, *e. gr.* will be refused where the form of the rate, as the defendants were required to make it, is bad. *Rex v. Chapelwardens of Haworth*, 12 East, 556.

(b 7) *To enforce a conviction.*

A *mandamus* to compel a magistrate to enforce a conviction for the plaintiff refused, where he had returned that the defendant was convicted of the penalty beforehand, but that the said conviction was invalid in law; and there was not an offence for which the said penalty was payable or could legally be levied. *Rex v. Robinson*, 2 Smith, 274.

(b 8) *To the treasurer of a county.*

A *mandamus* does not lie to a ministerial officer to compel obedience of his duty; the remedy is by indictment; not, therefore, to the treasurer of a county to compel obedience to an order of quarter sessions. *Rex v. Bristol*, 6 T. R. 168.

(b 9) *To examine witnesses in India.*

A *mandamus* to examine witnesses in India pursuant to stat. does not lie where the suit is by an Indian mariner for wages in respect of a voyage undertaken, since his arrival here, from this country to the West Indies. *Francisco v. Gilmore*, 1 B. & P. 177.

(b 10) *For the transfer of stock.*

A *mandamus* does not lie to the Bank of England to transfer stock. *Rex v. Bank of England*, Dougl. 524.

(b 11) *For administration.*

A *mandamus* for administration to the next of kin will not be granted, if a suit be depending concerning the validity of a will. *Rex v. Hay*, 4 Burr. 2295; 1 Blk. 668.

IV. ON THE APPLICATION FOR.

(a) *Of the parties to rules for.*

In rules for a *mandamus* to elect a mayor, a subsisting mayor *de facto* must always be a party. *Rex v. Bankes*, 3 Burr. 1452; 1 Blk. 445.

(b) *Of entitling affidavits in support of.*

Affidavits for a *mandamus* sworn in court, or before a judge of K. B., need not be entitled in the K. B. *Rex v. Hare*, 13 East, 189.

(c) *When made, in particular instances.*(c 1) *To proceed to an election.*

A *mandamus* to proceed to an election upon judgment of ouster, cannot be moved for till judgment be actually signed; and the prosecutor is entitled to the priority of this motion for a *mandamus*, in preference to every other person. *Rex v. West Loe Corporation*, 3 Burr. 1386.

(c 2) *For contribution to a fine levied under an indictment.*

A *mandamus* for a rate to reimburse those who have been compelled to pay a fine under an indictment against inhabitants for not repairing a road, must be applied for within a reasonable time after payment. *Rex v. Justices of Lancashire*, 12 East, 366.

(c 3) *To a canal company.*

An application for a *mandamus* to compel a canal company to assess the value of and amount of compensation due for land taken for the purpose of the canal, must be made within a reasonable time. *Rex v. The Stainforth and Keadly Canal Company*, 1 M. & S. 32.

(c 4) *To examine witnesses in India.*

The motion for a *mandamus* to examine witnesses in an information for offences in India under stat. 24 Geo. III. c. 25, and

26 Geo. III. c. 57, must be made within the four first full days after plea pleaded. *Rex v. Holland*, 4 T. R. 662.

(d) *Defence to.*

Where an application is made to the court for a *mandamus*, to direct the filling up any vacancies in a definite integral part of a corporation, the court will require strong grounds to induce them to refuse the writ, on account of the great inconvenience which may follow from the not filling up such vacancies, and the risk of dissolving the corporation. *Rex v. The Mayor of Granpond*, 6 T. R. 301.

(e) *Of issues thereon.*

When an application is made for a *mandamus*, and the question turns upon a custom which the parties litigating desire to have tried, the court will either grant the writ or direct an issue, according as the application is supported; and if unsupported, will discharge the rule. *Rex v. The Bishop of London*, 1 T. R. 331.

V. ON THE FORM OF THE WRIT.

(a) *General rule.*

1. A *mandamus* must state all facts necessary to shew that the prosecutor is entitled to the relief prayed. Those coroners of liberties or franchises alone are entitled to fees under stat. 12 Geo. III. c. 29, where the liberty is contributory to the county rates; in a *mandamus*, therefore, by such coroner, to compel an order for such fees, it must be stated that the liberty so contributes. *Rex v. The Justices of the West Riding of Yorkshire*, 7 T. R. 48.

2. Where a rule has been obtained for a *mandamus* to issue, and the *mandamus* is taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a *mandamus*, but materially enlarging the terms, the court will quash the *mandamus*, notwithstanding they might, upon the same affidavits, have granted one as large, had it been applied for. *Rex v. Lord and Stewards of Water Eaton Manor*, 2 Smith, 54.

(b) *For a dissenting minister.*

In support of a motion for a *mandamus* to the sessions to admit, &c. a protestant dissenter as teacher or preacher, it must be shewn that he has some distinct congregation attached to him as such. *Rex v. Justices of Denbighshire*, 14 East, 285.

(c) *For a curate.*

A *mandamus* to a bishop to grant a license to a curate upon the nomination of the inhabitants of a parish, must state that there is an immemorial usage for the inhabitants to elect, or an immemorial endowment. *Rex v. Bishop of Oxford*, 3 Smith, 341; 6 East, 345.

(d) *Of its direction, to a corporation.*

A direction of a *mandamus* to a corporation, by its corporate name, notwithstanding the vacancy of the mayoralty, is good, since that is the legal description of the body as long as it continues to have any corporate existence at all. But where the direction is not to the corporation by its corporate name, it seems to be bad, if it extends beyond the persons who are required by the charter to concur in the particular thing commanded by the *mandamus*. *Rex v. Smith*, 2 M. & S. 583.

VI. MODE OF OBJECTING TO.

(a) *In point of time.*

Objections to a *mandamus*, after a return, are too late. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

VII. ON THE RETURN TO THE WRIT IN GENERAL.

(a) *Matter of.*

An erroneous judgment is conclusive, until regularly reversed by error; and is, therefore, sufficient to support a return to a *mandamus*. *Rex v. The Justices of the West Riding of Yorkshire*, 7 T. R. 467.

(b) *Form of.*(b 1) *Whether regulated by the rules of pleading.*

The return to a *mandamus* being traversable, is regulated by the rules of pleading. *Rex v. The Mayor, &c. of Cambridge*, 2 T. R. 456.

(b 2) *Whether defective, when a negative pregnant.*

A return to a *mandamus* which is a negative pregnant, is bad; as where the writ having stated that the corporation being duly assembled, proceeded to the election of a recorder, the return is, that they were not duly assembled to proceed to the election of a recorder; thereby implying that they were assembled for some other pur-

pose. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

(b 3) *Detail of circumstances.*

1. *Seem*, that since an erroneous judgment cannot be impugned in a collateral proceeding, such judgment will support a return to a *mandamus*; therefore the return need not detail the circumstances necessary to support the judgment. *Rex v. Luddis*, 1 East, 306.

2. Where by the charter the transaction of certain business is limited to one particular day, a return to a *mandamus*, assigning as a reason for not completing it, that the day was consumed in the necessary business of the corporation, is bad, since it ought to be shewn what the business was, and how necessary, that the court may adjudge on the sufficiency of the excuse. *Rex v. The Corporation of Carmarthen*, 1 M. & S. 697.

(c) *On rules of construction.*

1. Presumption and intendment ought to be in favour of returns to *mandamus*. Dougl. 159.

2. Though the return to a *mandamus* is defective in parts, yet, if on the whole it appears that the party was justified in what he did, it is sufficient. *Rex v. The Archbishop of York*, 6 T. R. 490.

(d) *On the amendment of.*(d 1) *After filing.*

A clerical mistake in a return to a *mandamus* may be amended after the return has been filed. *Rex v. Lyme Regis*, Dougl. 135.

(d 2) *After a traverse.*

The return to a *mandamus* cannot be amended after it has been traversed. *Rex v. The Corporation of Stafford*, 4 T. R. 689.

(e) *Of quashing it in part.*

1. The return to a *mandamus* may be quashed as to part, and allowed as to part, provided the two are independant of, and not inconsistent with each other, since if they are, the whole must be quashed, for then the court cannot know which to believe. *Rex v. The Mayor, &c. of Cambridge*, 2 T. R. 456.

2. If several returns to a *mandamus* are inconsistent, the whole will be quashed. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

(f) *Of replying to.*

The prosecutor may reply to a return to a *mandamus*. Dougl. 159.

(g) *When considered as false.*

Case lies if the return to a *mandamus*, though true in words, is false in substance. *Rex v. Lyme Regis*, Dougl. 158.

VIII. ON THE RETURN TO THE WRIT IN PARTICULAR INSTANCES.

(a) *Matter of.*(a 1) *On a mandamus to admit.*

"Not duly elected," is a good return to a *mandamus* to admit. Dougl. 80.

(a 2) *On a mandamus to restore.*

1. "Not duly elected, admitted and sworn," is not a good return to a *mandamus* to restore. *Rex v. Lyme Regis*, Dougl. 79.

2. Return to a *mandamus* that A. was not duly elected sexton, according to ancient custom; that there is a custom for the inhabitants, &c. to remove at pleasure, and that A. was removed pursuant to such custom, is good. *Rex v. Churchwardens of Taunton St. James*, Cowp. 413.

(a 3) *On a mandamus to certify an election.*

If the election of one of two candidates for a recordership, is certified to the king, but is afterwards invalidated by judgment of ouster against an elector, the corporation cannot return these facts as an answer to a *mandamus* to certify the election of the other. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

(a 4) *On a mandamus to swear in churchwardens.*

Lis pendens is not a good return to a *mandamus* to swear in churchwardens, though accompanied with very special circumstances. *Rex v. Harris*, 3 Burr. 1420; 1 Blk. 430.

(b) *Form of.*(b 1) *On a mandamus to admit.*

A return to a *mandamus* to admit or shew cause to the contrary, may shew one or more, or any number of causes, provided they be consistent. *Wright v. Foxsett*, 4 Burr. 2041.

(b 2) *On a mandamus to restore.*

1. The return of removal to a *mandamus* to restore, must set forth the due execution

of the power of removal. Hence, if the person be within summons, i. e. if he be resident, since he must be summoned to attend, and shew cause against his disfranchisement, that he was so summoned must appear upon the return, unless it appear that he was actually heard. *Rex v. Gaskin*, 8 T. R. 209.

2. On a *mandamus* to restore to the office of a capital burgess in a return,—that the cause of a motion was non-attendance at a meeting to which the party was summoned for the election of a capital burgess,—an averment, that the right of election is,—in the capital burgesses being the common council,—does not assert with sufficient certainty that he had a right to concur in the election, because it does not necessarily appear that all the capital burgesses are of the common council. *Rex v. Lyme Regis*, Dougl. 177.

3. A return to a *mandamus* to restore an alderman disallowed, because it did not set forth a total desertion from the place of which the party was alderman. *Rex v. Leicester Corporation*, 4 Burr. 2087.

(b 3) *On a mandamus to certify an election.*

A return to a *mandamus* to certify the election of a recorder, stated to have been made on a given day,—that the corporation were not duly assembled on that day to proceed to the election of a recorder, imports that they were not convened at all that day, and is therefore inconsistent with a return which states an election upon that day of some other corporate officer, though the days are laid under *videlicet*s, unless it be shewn that the meeting was sufficiently constituted for the election of the latter, though not of the former. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

IX. OF TRAVERSES RELATIVE TO.

(a) *Form of.*

If a *mandamus* to certify an election, state,—“by reason of which said premises A. was duly elected,” the return cannot traverse that,—“A. was not elected as by the writ is supposed,” since that is traversing what is but a conclusion of law from previous facts; it should traverse the facts themselves. *Rex v. The Mayor, &c. of York*, 5 T. R. 66.

(b) *Where tried.*

Where in a writ of *mandamus* the facts

are alleged to have happened in a particular county, and issue as to their existence is joined there, the *venire* must be from that county. *Re v. The Mayor, &c. of Newcastle upon Tyne*, 1 East, 114.

MANOR.

I. RELATIVE TO THE CUSTOMS OF.

- (a) *Valid customs*, p. 655.
- (b) *Void customs*, p. 655.
- (c) *Construction of*, p. 656.

II. RELATIVE TO AGREEMENTS BETWEEN LORD AND TENANT.

- (a) *Construction of*, p. 656.

III. RELATIVE TO THE STEWARD OF.

- (a) *Measure of his fees*, p. 655.

IV. RELATIVE TO SEPARATIONS FROM.

- (a) *Of the waste*, p. 656.
- (b) *By the fine of a tenant for life*, p. 656.

V. RELATIVE TO INCLOSURES FROM.

- (a) *Legal effect of*, p. 656.
- (b) *Presumption of a license to warrant*, p. 656.

I. RELATIVE TO THE CUSTOMS OF.

- (a) *Valid customs*.

1. A custom that the inhabitants of a manor shall grind all their corn, grain, and malt, which by them, or any of them, shall be used or spent ground within the manor, at certain mills, is good. *Cort v. Birkbeck*, Dougl. 218.

2. Where there is a custom in a manor, that upon the death of the tenant for life, he in remainder shall come in and be admitted tenant, and pay a fine, it is a good custom, although the admittance of tenant for life is the admittance of him in remainder. The proclamation to the tenant to come in to be admitted, is good in such a case, in general terms, without naming the particular tenant, although in the remainder he is named specially. *Re d. Whitbread & Jenny*, 2 Smith, 116; 5 East, 522.

- (b) *Void customs*.

1. A custom warranting an admission

must at the least for a private injury to the lord of the manor, is void. *Wood v. Lovcatt*, 6 T. R. 511.

2. Several customs pleaded for all the tenants of a manor, their farmers and occupiers of tenements of the manor, having gardens, to take soil covered with grass on a common, for making and repairing grass-plots in gardens for the improvement thereof, and for the improvement of the gardens; and further, for the making and repairing of banks and mounds for the hedges of fences of tenements belonging to the manor; and further, for the improvement of such tenements, not saying agricultural improvement. Held, each to be too large and uncertain, and destructive of the right of common. *Lady Wilson v. Willes*, 3 Smith, 167; 7 East, 121.

- (c) *Construction of*.

Where the custom of a manor is silent, the common law must regulate the course of descent. A party, therefore, contending that a copyhold shall descend contrary to the rules of the common law, must shew that such descent is warranted by the custom. Proof that by the custom lands shall descend to the elder sister where there is neither a son nor a daughter, does not warrant an inference, that where a copyholder dies leaving several females who by the common law would be his co-heiresses, the eldest of those females shall inherit. *Denn, ex dem. Goodwin, v. Spray*, 1 T. R. 466.

II. RELATIVE TO AGREEMENTS BETWEEN LORD AND TENANT.

- (a) *Construction of*.

An agreement between the lord and tenants of a manor, that the tenants may cut down, use, and dispose of wood for the repairing, upholding, or maintaining of their houses, hedges, and fences, "or for any other their necessary uses," does not empower them to fell wood for sale; for which, if they do, the lord may support trover. The words "or for any other their necessary uses," mean, uses in their characters of tenants. *Blissett, bart. v. Lowe*, 2 M. & S. 494.

III. RELATIVE TO THE STEWARD OF.

- (a) *Measure of his fees*.

Where there is a custom in a manor

for the payment of a separate set of fees to the steward, upon the surrender of each separate tenement, and two are admitted as tenants in common of one piece of land; two sets of fees become due, and continue payable, although the land is afterwards conveyed to one person, as in the case of indivisible services. *Attree v. Scutt*, 2 Smith, 449; 6 East, 476.

IV. RELATIVE TO SEPARATIONS FROM.

(a) *Of the waste.*

If a manor be granted, reserving the waste, these are thereby severed from the manor, subject, however, to the rights of common, &c. as before. *Revell v. Jodrell*, 2 T. R. 415.

(b) *By the fine of a tenant for life.*

A fine by tenant for life of parcel of a manor, the residue being in possession of the tenant in fee, severs it from the manor. *Goodright*, ex dem. *Fowler v. Forrester*, 8 East, 552.

V. RELATIVE TO INCLOSURES FROM.

(a) *Legal effect of.*

An inclosure by a tenant of parcel of the waste, shall be presumed to have been made for the lord's benefit. *Bryan*, ex dem. *Child*, v. *Winwood*, 1 Taunt. 208.

(b) *Presumption of a license to warrant.*

An inclosure from the waste twelve years old, seen, without objection, from time to time, by the lord and steward, may be presumed to have had his license. *Doe*, ex dem. *Foley*, v. *Wilson*, 11 East, 56.

MANSLAUGHTER.

(a) *In firing to bring a vessel to.*

If an officer on the impress service fire, in the usual manner, at the haulyards of a boat, in order to bring her to, and kill a man, it is only manslaughter. *Rex v. Phillips*, Cowp. 830.

MANUFACTURER.

(a) *Relative to the regulation of the wages of.*

The manner of proceeding, and whether a rate of wages shall be limited or not,

under stat. 5 Eliz. c. 4, s. 15, and 1 Jac. I., c. 6, s. 3, is in the discretion of the justices. *Rex v. The Justices of Cumberland*, 1 M. & S. 190.

MARKET.

I. RELATIVE TO THE OWNER'S RIGHTS.

(a) *To change the situation of holding it*, p. 656.

(b) *On sales by sample*, p. 656.

II. RELATIVE TO THE DISTURBANCE OF.

(a) *Whether legalized by adverse enjoyment*, p. 656.

III. INCIDENTAL PRIVILEGES OF THOSE FREQUENTING IT, p. 657.

I. RELATIVE TO THE OWNER'S RIGHTS.

(a) *To change the situation of holding it.*

1. Though the holder of a market granted to be holden within a particular district, hold it for more than twenty years upon land without the limits prescribed; the public cannot prevent his removing it within the limits, if the terms of the grant confining it therein can be shewn. *Curwen v. Salkeld*, 3 East, 538.

2. The owner of a market granted to be holden within a particular district, may, after appointing it in one place therein, remove it to another, notwithstanding he may have induced individuals to build on the land adjoining the former place, upon the assurance that he meant to fix it irremovably there; whose remedy, if any, is by action. *Curwen v. Salkeld*, 3 East, 538.

(b) *On sales by sample.*

An action lies by the owner of a market entitled to toll, for selling therein by sample, without paying toll on the entire bulk. *The Corporation of Tewkesbury v. Bricknell*, 2 Taunt. 120.

II. RELATIVE TO THE DISTURBANCE OF.

(a) *Whether legalized by adverse enjoyment.*

The owner of a market cannot sue for erecting one in his neighbourhood, after

an adverse uninterrupted enjoyment of 20 years. *Holcroft v. Keel*, 1 B. & P. 400.

III. INCIDENTAL PRIVILEGES OF THOSE FREQUENTING IT.

The right to erect stalls, or place tables in a market, is not an incidental privilege of those frequenting it. *Mayor of Norwich v. Swan*, 2 Blk. 1116.

MARRIAGE.

I. RELATIVE TO THE PUBLICATION OF BANNS.

- (a) *True names of the parties defined*, p. 657.

II. RELATIVE TO THE PLACE OF CELEBRATION.

- (a) *A chapel*, p. 657.

III. RELATIVE TO THE CELEBRATION OF MARRIAGES ABROAD.

- (a) *Form of*, p. 657.
(b) *Proof of*, p. 657.

IV. RELATIVE TO THE PROOF OF.

- (a) *In civil suits*, p. 658.

V. ON THE MARRIAGE OF ILLEGITIMATE CHILDREN, p. 658.

VI. RELATIVE TO ITS LEGAL OPERATION ON PREVIOUS RELATIONS.

- (a) *The relation of debtor and creditor*, p. 658.

VII. RELATIVE TO CONTRACTS AND CONDITIONS IN RESTRAINT OF.

- (a) *Illegality of*, p. 658.
(b) *What are considered as*, p. 658.
(c) *What are not considered as*, p. 658.

I. RELATIVE TO THE PUBLICATION OF BANNS.

- (a) *True names of the parties defined*.

1. The spirit of the Marriage Act requires that the banns shall be published in the true names of the parties. And by "the true names," is to be understood the names by which they are known in the world; since the end of the statute, in requiring the publication of banns, being to

secure notoriety, and to apprise all persons of the intention of the parties to contract marriage, that object cannot be better, or indeed otherwise attained, than by a publication in the name by which the party is known; *Rex v. Inhabitants of Billingshurst*; and the ecclesiastical cases there cited; 3 M. & S. 250.

2. That is the party's name, within the meaning of the Marriage Act, by which he is known at the place where he resides, unless he has assumed it with a fraudulent purpose, as to impose upon the woman he is about to marry. An assumption of a fictitious name, to conceal himself, being a criminal or deserter, from pursuit, is not fraudulent. A marriage by his real name, and not by that by which he is known, would be a fraud upon the Marriage Act, and void. *Rex v. Inhabitants of Burton-upon-Trent*, 3 M. & S. 537.

II. RELATIVE TO THE PLACE OF CELEBRATION.

- (a) *A chapel*.

A marriage is void, if celebrated in a chapel erected since 26 Geo. II, c. 33, although marriage may in fact have been frequently celebrated there. *Rex v. Northfield*, Dougl. 659. But see 21 Geo. III, c. 53.

III. RELATIVE TO THE CELEBRATION OF MARRIAGES ABROAD.

- (a) *Form of*.

British subjects resident in a British settlement abroad, are governed by the laws of this country, and consequently, with respect to marriage, by the law which existed here before the Marriage Act, viz. the canon law. Therefore, where two British subjects, being protestants, were married at Madras by a Portuguese roman-catholic priest, according to the catholic form, in the Portuguese language, in a private room, and the ceremony was followed by cohabitation;—held, that this was a valid marriage, though without a license from the governor, which it is the custom at Madras to obtain. *Lautour v. Teesdale*, 2 Marshall, 243.

- (b) *Proof of*.

What shall be evidence of a marriage abroad. *Rex v. Inhabitants of Brompton*, 10 East, 282.

IV. RELATIVE TO THE PROOF OF.

(a) *In civil suits.*

An action for criminal conversation is the only civil case where the actual celebration of a marriage must be proved. Dougl. 174. *Supra*, ADULTERY.

V. ON THE MARRIAGE OF ILLEGITIMATE CHILDREN.

Illegitimate children are within the Marriage Act. *Priestly v. Hughes*, 11 East, 1.

VI. RELATIVE TO ITS LEGAL OPERATION ON PREVIOUS RELATIONS.

(a) *The relation of debtor and creditor.*

The general rule is, that by marriage between debtor and creditor, the debt is extinguished. The case where a man, in contemplation of marriage, and with a view to provide for his intended wife, gives her a bond, conditioned for the payment of money after his death, is an exception. *Milbourn v. Ewart*, 5 T. R. 381.

VII. RELATIVE TO CONTRACTS, AND CONDITIONS IN RESTRAINT OF.

(a) *Illegality of.*

Contracts in restraint of marriage are void. *Lowc v. Peers*, 4 Burr. 3225.

(b) *What are considered as.*

1. A bond not to marry any one but the obligee. *Lofft*.
2. A wager laid by a party, that he will not marry within six years, is void, unless good reasons for the restraint can be shewn. *Hartley v. Rice*, 10 East, 22. See the index, tit. MARRIAGE.

(c) *What are not considered as.*

A condition restraining marriage with a Scotchman is legal. *Perris v. Lyon*, 9 East, 170. See the index, tit. MARRIAGE.

MARRIAGE SETTLEMENT.

I. RELATIVE TO THE CONSTRUCTION OF.

- (a) *In the case of personality*, p. 658.
- (b) *In the case of realty*, p. 658.

II. AFTER A VOID MARRIAGE, p. 659.

MARRIAGE SETTLEMENT.

I. RELATIVE TO THE CONSTRUCTION

(a) *In the case of personality.*

1. A bond is given on a marriage, to pay a sum of money, in case the wife, or any issue of her body begotten by her intended husband, should survive the obligor. The word *issue* is not confined to the children of the marriage, but extends to succeeding generations, this being its natural import, and there not being the same reason here, as in the limitations of real property, to confine it to the next generation. *Haydon v. Wilshere*, 3 T. R. 372.

2. By a settlement made previous to marriage, reciting an agreement that the wife's stock in trade, book debts, &c. should be assigned to a trustee, for her separate use, and to enable her to trade separately, her stock in trade and "other effects in the apartments then in her occupation," were assigned accordingly. Held, that the furniture of those apartments was included. *Jarman v. Woolton*, 3 T. R. 618.

(b) *In the case of realty.*

1. A woman is entitled to lands, some in possession and some in remainder, after an estate-tail limited to her sister. On her marriage, a deed of settlement recites, that "in consideration of the real and personal estate which her intended husband was to have and receive with her," &c. Held, that the estate in remainder not having been expressly specified, the intention was, that the lands in possession only should be given up. *Beable v. Dodd*, 1 T. R. 193.

2. Under a marriage settlement, lands are conveyed to trustees and their heirs, to the use of the intended wife until marriage, and afterwards to her separate use for life, remainder to the use of the husband for life, remainder to the use of all and every the child or children of the marriage; and power is given to the husband and wife to revoke and make void the uses declared. Held, 1. That the limitation to the trustees was not an use executed in them, and therefore, that the remainders over were not dependant on their interest. 2. That the remainder to the children became a vested remainder on the birth of the first child, subject to open and let in after-born children, and

also subject to be divested by the execution of the power; and therefore, that it was not destroyed afterwards, by destruction of the particular estate by which, whilst a contingent remainder, it had been supported. *Doc*, ex dem. *Willis*, v. *Martin*, 4 T. R. 39.

3. Under a marriage settlement, the husband's estate was conveyed to trustees, to the use of the husband for life, sans waste; remainder to trustees, to preserve, &c.; remainder to the use of the wife for life, for her jointure, and in bar of dower; remainder to the first and othersons of the marriage in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the body of the husband and wife; remainder to the right heirs of the husband. The wife survived, without issue. Held, that she was tenant in tail, after possibility, &c. and unimpeachable of waste. *Williams* v. *Williams*, 12 East, 209.

4. A covenant in a family settlement by A, the owner of a lease for years, that if he should die before its expiration, his representative should assign the residue to B, does not preclude A. from purchasing the reversion, and thereby merging the term. *Williamson* v. *Butterfield*, 2 B. & P. 63.

5. Bond by husband, conditioned to settle all land of which he should be seised during his natural life, upon his intended wife, and issue of the marriage, in such parts and proportions, and to such uses as should be requisite, the better to make provision for her in case she should survive, does not require land purchased after the wife's decease to be settled on the issue. *Prebble* v. *Boghurst*, 7 Taunt. 538.

II. AFTER A VOID MARRIAGE.

A settlement made after a void marriage, by the persons supposing themselves to be husband and wife, is not vitiated by the mistake. *Boughton* v. *Sandilands*, 3 Taunt. 348.

MASTER AND SERVANT.

I. INDIVIDUALITY OF.

(a) *In relation to the occupation of a tenement*, p. 660.

II. DISSOLUTION OF THE RELATION.

(a) *From misconduct in the servant*, p. 660.

III. RELATIVE TO THE MASTER.

(a) *Who considered as.*

(a 1) *On a retainer by a bailiff*, p. 660.

(b) *Action by master, for enticing his servant away.*

(b 1) *When maintainable, in relation to the class of servant*, p. 660.

(b 2) *Defence to, from previous satisfaction*, p. 660.

(c) *Action by master, for harbouring his servant.*

(c 1) *Whether maintainable*, p. 660.

(d) *Of his obligation to support or relieve his servant*, p. 660.

(e) *Of his liability for his servant's misconduct.*

(e 1) *General rules*, p. 660.

(e 2) *Whether criminally liable*, p. 660.

(e 3) *Evidence to connect him with,—on the rule of a libel*, p. 660.

(f) *Of the action against, for his servant's misconduct.*

(f 1) *Declaration in, form of*, p. 660.

(g) *Of the jurisdiction of magistrates over.*

(g 1) *Under 42 Geo. III, c. 90*, p. 660.

(g 2) *Under 42 Geo. III, c. 90, and 43 Geo. III, c. 82*, p. 661.

IV. RELATIVE TO THE SERVANT.

(a) *Of his authority to bind the master on a sale*, p. 661.

(b) *When protected, in obedience to his master's orders*, p. 661.

(c) *Of his wages.*

(c 1) *When under imprisonment*, p. 661.

(c 2) *Apportionment of*, p. 661.

(d) *Of actions by servant against master.*

(d 1) *For slandering his character,—evidence in*, p. 661.

(e) *Of the jurisdiction of magistrates over.*

(e 1) *Under 5 Eliz. c. 4*, p. 661.

(e 2) *Under 1 Jac. I, c. 6, s. 2 & 3, p. 661.*

(e 3) *Under 20 Geo. II, c. 19, p. 661.*

(e 4) *Under 6 Geo. III, c. 25, p. 661.*

(e 5) *How exercised under 20 Geo. II, c. 19; and 6 Geo. III, c. 25, p. 661.*

I. INDIVIDUALITY OF.

(a) *In relation to the occupation of a tenement.*

The possession of a servant occupying a cottage, with less wages on that account, is that of his master. *Bertie v. Beaumont*, 16 East, 33.

II. DISSOLUTION OF THE RELATION.

(a) *From misconduct in the servant.*

If a servant misconducts himself, the master may dissolve the contract of hiring between them. *Rex v. Inhabitants of Barton-upon-Irwell*, 2 M. & S. 329.

III. RELATIVE TO THE MASTER.

(a) *Who considered as.*

(a 1) *On a retainer by a bailiff.*

Where a bailiff retains a labourer under the authority, express or implied, of his master, the master is the employer within the st. 20 Geo. II, c. 19. *Rex v. Hosen*, 14 East, 605.

(b) *Action by master, for enticing his servant away.*

(b 1) *When maintainable in relation to the class of servant.*

Action lies for the seduction of a journeyman. *Hart v. Aldridge*, Cowp. 54; Loft. 493.

(b 2) *Defence to,—from previous satisfaction.*

No action will lie for seducing an articulated servant from his master, if the servant has paid the penalty stipulated by the articles for leaving. *Bird v. Randall*, 3 Burr. 1345; 1 Blk. 373.

(c) *Action by master for harbouring his servant.*

(c 1) *Whether maintainable.*

It is actionable to harbour the servant of another after notice, though the party

did not originally induce him to leave his master. *Blake v. Lanyon*, 6 T. R. 221.

(d) *Of his obligation to support or relieve his servant.*

1. A master is under no legal obligation to pay for medicines supplied to his servant, maimed in discharging his duty. *Wennall v. Adney*, 3 B. & P. 247.

2. He may justify an assault in defence of his servant. Loft. 215.

(e) *Of his liability for his servant's misconduct.*

(e 1) *General rules.*

1. A master is liable for every act of his servant done by him in the course of his employment. *Woodgate v. Knatchbull*, 2 T. R. 154.

2. A master is not answerable for every act of his servant's life, but only for those done in his relative capacity; therefore, to charge the master as such for his servant's misconduct, it must always be shewn or presumed, that the relation of master and servant subsisted between them in the particular affair. *M'Manus v. Crickett*, 1 East, 106.

(e 2) *Whether criminally liable.*

It seems, that if the servant of a baker, without his master's knowledge, mixes a noxious article with the bread, the servant only, not the master, is indictable. *Rex v. Dixon*, 3 M. & S. 11.

(e 3) *Evidence to connect him with,—on the sale of a libel.*

Evidence of buying a libel in the shop of a known bookseller, is sufficient *prima facie* evidence to convict him of publication. *Rex v. Almon*, 5 Burr. 2686.

(f) *Of the action against, for his servant's misconduct.*

(f 1) *Declaration in, form of.*

The act of the servant as such, is that of the master; if, therefore, the occasion of injury to another, in an action against the master, it may be stated as his own. *Bricker v. Fromont*, 6 T. R. 659.

(g) *Of the jurisdiction of magistrates, over.*

(g 1) *Under 42 Geo. III, c. 90.*

No demand need be made previous to issuing the warrant of distress under

42 Geo. III, c. 90, s. 61. *Wootton v. Harvey*, 6 East, 75.

(g 2) *Under 42 Geo. III, c. 90, s. 43 Geo. III, c. 82.*

Upon an order of justices under 42 Geo. II, c. 90, s. 41, and 43 Geo. III, c. 82, s. 44, against a master to pay 5*l.* to his servant, who was enrolled in the army of reserve, held, that after notice of the order, and twenty-one days elapsed, and the order confirmed upon appeal to the quarter sessions, the sum might be levied by a warrant of distress, without shewing a demand by the servant, or militia-man, &c. after the determination of the appeal. *Wood v. Harvey*, 2 Smith, 238.

IV. RELATIVE TO THE SERVANT.

(a) *Of his authority to bind the master as a sale.*

Where on the purchase of a horse, the vendor had given a warranty of soundness generally, and the servant who was sent with the receipt to the agent of the other party, inserted at his request, but without a special or general authority from his master, after the words warranted sound, "to the regiment."—Held, that the master was not bound by this alteration of the warranty, notwithstanding the money afterwards came to his hands. *Strode v. Dyson*, 1 Smith, 400. See tit. PRINCIPAL AND AGENT.

(b) *When protected in obedience to his master's orders.*

1. A servant is not protected, even in a penal action, from the consequences of obeying his master's orders, if the master had no authority to direct him. *Calcraft v. Gibbs*, 5 T. R. 19.

2. A servant ignorantly meddling with another's property, by command and for the use of his master, is liable to the owner. *Stevens v. Ewall*, 4 M. & S. 259.

(c) *Of his wages.*

(c 1) *When under imprisonment.*

Semble, a servant imprisoned under 20 Geo. II, c. 19, s. 2, is not entitled to wages during the time of his imprisonment. *Rex v. Inhabitants of Barton-upon-Irwell*, 2 M. & S. 329.

(c 2) *Apportionment of.*

Where by the terms of a contract of

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service, the wages are not payable until the time of service has expired, and the servant dies, or the service is otherwise terminated without the master's fault, in the interim, none are due *pro tanto*, unless under a custom or usage. An exception to this rule is the case where a seaman is impressed. *Cutter v. Powell*, 6 T. R. 320.

(d) *Of actions by servant against master.*

(d 1) *For slandering his character,—evidence in.*

The circumstances that a master having discharged a servant, requested the master with whom he lived before, not to give him another character; and that on application to himself for a character, he gave the servant a bad one; are sufficient whence malice may be implied. *Rogers v. Clifton*, 3 B. & P. 587.

(e) *Of the jurisdiction of magistrates over.*

(e 1) *Under 5 Eliz. c. 4.*

An order discharging a servant under 5 Eliz. c. 4, is a nullity, unless it appear upon the face of it that she was a servant in husbandry. *Rex v. Hulcott*, 6 T. R. 583.

(e 2) *Under 1 Jac. I, c. 6, s. 2 & 3.*

The jurisdiction of the sessions under 1 Jac. I, c. 6, s. 2 & 3, is not confined to servants in husbandry. *Rex v. Justices of Kent*, 14 East, 395.

(e 3) *Under 20 Geo. II, c. 19.*

1. The st. 20 Geo. II, c. 19, extends to labourers of every class. *Lowther v. Lord Radnor*, 8 East, 113.

2. A servant sentenced by a magistrate to imprisonment under st. 20 Geo. II, c. 19, s. 2, must likewise be sentenced to correction and hard labour. *Rex v. Hoseason*, 14 East, 605.

(e 4) *Under 6 Geo. III, c. 25.*

A magistrate cannot, under st. 6 Geo. III, c. 25, sentence an offender to be corrected. *Rex v. Hoseason*, 14 East, 605.

(e 5) *How exercised under 20 Geo. II, c. 19; & 6 Geo. III, c. 25.*

The punishments which a magistrate may inflict under st. 20 Geo. II, c. 19, s. 2, and 6 Geo. III, c. 25, cannot be blended in the same sentence. *Rex v. Hoseason*, 14 East, 605.

MAXIMS.

I. POLITICAL.

- (a) *Conclusiveness of the acts of a state*, p. 662.
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- (g) *Of prejudice arising from an unauthorized suit*, p. 662.
- (h) *Omnis rati habitio, &c.* p. 662.

I. POLITICAL.

- (a) *Conclusiveness of the acts of a state.*

All judicial acts done in one country over the property of the subjects within its jurisdiction, are conclusive on the property of those parties in any other country. *Ogden v. Folliot*, 3 T. R. 733.

- (b) *Of the notice taken of the laws of another state.*

The penal laws of one country cannot be taken notice of in another. *Ogden v. Folliot*, 3 T. R. 733, 735.

- (c) *Of delivering up offenders.*

This country will deliver up an offender against the laws of a foreign state, *Mure v. Kaye*, 4 Taunt. 34.

- (d) *A seizure jure belli, defined.*

A seizure of property as contraband, by an enemy, cannot be described as a seizure *jure belli*. *Matthie v. Potts*, 3 B. & P. 23.

II. MUNICIPAL.

- (a) *Force of precedent and opinion.*

1. It is advisable to adhere to old

forms, even if it were only for the sake of uniformity of proceeding. *Res v. Marsden*, 4 M. & S. 168.

2. Common opinion acted upon, is evidence of what the law is. *Isherwood v. Oldknow*, 3 M. & S. 396, 397.

- (b) *In relation to matter and form.*

Things are to be judged of as they really are; not as they appear to be. They must be stripped of their cover, and looked at in their naked form. *Res v. Bradford*, 4 M. & S. 322.

- (c) *Ignorantia excusat.*

Ignorance of a fact, with full means of ascertaining it, is no defence. *Doe, ex dem. Martin, v. Watts*, 7 T. R. 83. See CONTRACT.

- (d) *Quivis renunciare, &c.*

An advantage may always be waived by the party for whose benefit it was introduced; and if he does not choose to insist upon it, third persons cannot. *Bickerdike v. Bollman*, 1 T. R. 405; *Borill v. Wood*, 2 M. & S. 25.

- (e) *Finis nomen, &c.*

The end and conclusion gives a character and denomination to the original act. *Res v. Inhabitants of Ribchester*, 2 M. & S. 138.

- (f) *Of the election of a sufferer between two innocent persons.*

1. Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it. *Lickbarrow v. Mason*, 2 T. R. 70; S. C. 5 T. R. 683; 1 H. B. 357; 2 H. B. 211.

2. In a case where one of two innocent persons must suffer by the fraud or negligence of a third, that party who gave him credit, and acted as one who believed and confided in him, must be the sufferer. *Fitzherbert v. Mather*, 1 T. R. 12.

- (g) *Of prejudice arising from an unauthorized suit.*

A man cannot be prejudiced by a suit brought in his name, without his authority. *Robson v. Eaton*, 1 T. R. 62.

- (h) *Omnis rati habitio, &c.*

1. An act cannot be construed into an adoption of that which the party neither

knows nor anticipates at the time, so as to let in the maxim of *omnis ratihabitio, &c.* *Bell v. Janson*, 1 M. & S. 201.

2. That a party may become a wrongdoer by subsequent assent, he must have been in a situation to have originally commanded the injurious act. *Nicoll v. Glennie*, 1 M. & S. 588.

3. An existing authority to detain an alien vessel, though unknown to the captor, legalizes the detention. *Routh v. Thompson*, 13 East, 274.

MESNE PROFITS.

I. OF THE PARTY ENTITLED TO.

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II. OF THE ACTION FOR.

(a) *Pleadings in.*

(a 1) *Declaration*, p. 663.

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(b) *Of the costs in.*

(b 1) *Where the damages are under 40 s.* p. 663.

I. OF THE PARTY ENTITLED TO.

(a) *Of the period antecedent to the avoidance of a fine.*

Mesne profits, between the time of a fine levied and of entry to avoid it, are not recoverable at law. *Doe v. Hicks*, 7 T. R. 433.

II. OF THE ACTION FOR.

(a) *Pleadings in.*

(a 1) *Declaration.*

The omission in a court for mesne profits, to state a precise day on which the entry was made, and a precise period during which possession was retained, is only objectionable on special demurrer. *Higgins v. Highfield*, 13 East, 407.

(a 2) *General issue.*

Acceptance of rent of premises, recovered in ejectment for the time elapsed since the demise laid, cannot be given in evidence under the general issue, in an action for mesne profits. *Doe, d. Hill, v. Leo*, 4 Tamm. 459.

(b) *Of the costs in.*

(b 1) *Where the damages are under 40 s.*

As well where trespass for mesne profits is brought in the name of the nominal lessee, as in that of the lessor of the plaintiff in the ejectment; if the plaintiff recover less than 40 s., and it is not certified that the title came in question, no more costs than damages are recoverable. *Doe v. Davies*, 6 T. R. 593.

MIDDLESEX COUNTY COURT.

JURISDICTION OF.

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(b) *Over personal representatives.*

(b 1) *When suing*, p. 663.

(b 2) *When sued*, p. 663.

JURISDICTION OF.

(a) *In relation to the subject matter.*

1. A demand, reduced at the trial to less than 40 s. by the defence of infancy, is within the Middlesex county court act. *Bateman v. Smith*, 14 East, 301.

2. An action for use and occupation lies in the county court of Middlesex. *Parker v. Vaughan*, 1 B. & P. 29.

(b) *Over personal representatives.*

(b 1) *When suing.*

If the damages are under 40 s. in *assumpsit* against an inhabitant of Middlesex, the defendant shall have double costs, whether the plaintiff sue in his own right or as personal representative. *Wase v. Wyburd*, Dougl. 246.

(b 2) *When sued.*

A personal representative cannot be sued in the county court of Middlesex, and therefore shall pay costs, though the damages are under 40 s. *Ailway v. Burrows*, Dougl. 263.

MILITIA.

I. OF BALLOTING FOR.

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II. MILITIA ACT, CONSTRUCTION OF.

- (a) *The term "executing any power," defined, 664.*

I. OF BALLOTING FOR.

- (a) *Continuation of the same ballot, defined.*

If, at the time of enrolment, a militiaman is discovered to be unqualified, and another is ballotted in his room, out of the same list, this is a continuance of the same, and therefore a legal ballot, under stat. 42 Geo. III, c. 90, and 47 Geo. III, c. 71. *Astley v. Ray*, 2 Taunt. 214.

II. MILITIA ACT, CONSTRUCTION OF.

- (a) *The term "executing any power," defined.*

Receiving pay is not "executing any power" within s. 14 of the Militia Act, 42 Geo. III, c. 90. *Robinson v. Garthwaite*, 9 East, 296.

MISNOMER.

I. IN CIVIL PROCEEDINGS.

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 (g) *Objections to, when and how taken.*
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MISNOMER.

- (h) *How cured.*
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II. IN A PENAL INFORMATION.

- (a) *How cured.*
 (a 1) *By appearance, p. 667.*

III. IN CRIMINAL PROCEEDINGS.

- (a) *Plea of misnomer, p. 667.*
 (a 1) *Whether pleadable in person, or by attorney, p. 667.*
 (a 2) *Form of, p. 667.*
 (a 3) *Judgment thereon, p. 667.*

I. IN CIVIL PROCEEDINGS.

- (a) *What is or is not.*
 (a 1) *From mis-spelling.*

1. The mis-spelling of a name is not a misnomer, if it is still *idem sonans*. *Ahitbol v. Beniditto*, 2 Taunt. 401.

2. A plea of misnomer that the defendant's name is Shakespeare, not Shakespeare, is good. *Rex v. Shakespeare*, 10 East, 83.

- (a 2) *From inversion.*

An inversion of two christian names of baptism,—thus B. A. for A. B. is a misnomer. *Jones v. Macquillin*, 5 T. R. 195.

- (a 3) *From omission.*

Proceedings set aside on the ground that the defendant having two christian names, is sued by only one of them. *Arbousin v. Willoughby*, 1 Mars. 477.

- (a 4) *From giving the initials only.*

An affidavit and *capias* against the defendant, by the initial only of his christian name, is regular. *Howell v. Coleman*, 2 B. & P. 466.

- (a 5) *In relation to a previous estoppel.*

1. Whether a man be known in the world by a particular name, does not depend upon his having been called so upon one or two occasions, but on a plurality of times. *Mestaer v. Hertz*, 3 M. & S. 453.

2. Where A, having two christian names, has omitted one of them in his

dealings with B; he cannot, in an action brought against him by B, make the same omission a ground for setting aside the proceedings. *Walker v. Willoughby*, 2 Mars. 230; 6 Taunt. 530.

3. A party to a deed must be sued thereon by the christian name in which he is described therein. *Gould v. Barnes*, 3 Taunt. 504.

4. A party may be sued for a false return to a *mandamus*, by the name and description given in the return. *Stead v. Keaton*, 4 T. R. 669.

(a6) *Where defendant is sued as A, arrested by the name of B.*

Where the defendant is sued as A, (his proper name) arrested by the name of B, there is no misnomer. *Murray v. Hubbard*, 1 B. & P. 645.

(b) *In a recognizance of bail.*

(b 1) *Its legal effect.*

As well where the defendant is no party as where he is, to the recognizance of bail, he is estopped by the name given him therein. *Meredith v. Hodges*, 2 N. R. 453; *Anon.* Loft. 82.

(c) *Variance in the names between the process and notice subjoined.*

A variance between the copy of the process served, and the notice subjoined, in the defendant's christian name, is fatal. *Jones v. Armytage*, 2 B. & P. 38.

(d) *Of a co-defendant.*

1. If in a suit, *ex delicto*, against two, one defendant is described in the *alias latitat*, by a different name to that in the original, the proceedings as to him will be set aside. *Corbett v. Bates*, 3 T. R. 660.

2. It is a sufficient answer to proof by one of two partners sued jointly, that he had no partner of the name given to the other, that the other, though misnamed, was the identical co-contractor. *Dickinson v. Bowes*, 16 East, 110.

(e) *Its effect in relation to the execution of process.*

Process against a party by a wrong name is void, and the officer who executes it a trespasser, unless the party has estopped himself disputing the name he is

called by; as where he has passed in the world by that name; or omitted to plead the misnomer to the action in which the process issues. *Cole v. Hindson*, 6 T. R. 234; *Shadgett v. Clipson*, 8 East, 328.

(f) *Its effect in relation to putting in bail.*

Bail put in by the defendant in a different name to that by which he is sued, though it be his right name, is a nullity at the plaintiff's option. *Rex v. Sheriff of Suffolk*, 4 Taunt. 818.

(g) *Objections to, when and how taken.*

(g 1) *Misnomer of the plaintiff.*

Misnomer of the plaintiff, though apparent to the court, can only be pleaded in abatement. *Clerk of Taunton Market v. Kimberly*, 2 Blk. 1120. See *Gardner v. Walker*, 3 Anst. 935.

(g 2) *Misnomer of the defendant.*

1. If a defendant, sued by the name of A, appear by his right name B, and the plaintiff declares against him by his right name B, the court will not interpose in a summary way to set aside the proceedings. *Hole v. Finch*, 2 Wils. 393.

2. If a defendant has a wrong addition given him in a *capias*, and he gives a bail-bond by his right addition, and the plaintiff afterwards declares against him by his right addition, the court will not set aside the proceedings. *Jackson v. Doleman*, 2 Wils. 393.

3. The defendant was misnamed in the process,—James instead of John; on an affidavit that John was his true name, and by that he had always been called and known, and application made before the time for pleading in abatement had expired, the court discharged him on common bail, and set aside the notice of declaration (without costs) on his undertaking not to bring an action. The objection *contra* was, that the regular and only course was by plea in abatement. *Smith v. Innes*, 4 M. & S. 360.

4. The court will discharge a defendant arrested by a wrong christian name, though he may plead in abatement, on his applying before the time for pleading in abatement has expired. *Wilks v. Lorck*, 2 Taunt. 399; *Binfield v. Maxwell*, 15 East, 159.

5. Proceedings will not be set aside for a misnomer in the process where the defendant might have pleaded misnomer in

abatement, after the title for pleading in abatement has expired. *Binfeld v. Maxwell*, 15 East, 159.

6. A defendant sued as "Jonathan, otherwise John Soans," cannot demur upon the ground that he is sued by two christian names, since *non constat* that he was not baptized "otherwise"; his remedy is by plea in abatement. *Scott v. Soans*, 3 East, 111.

7. Where a defendant is sued by a wrong name, receives notice of declaration, and neglects to appear and plead in abatement, but suffers the plaintiff to sign judgment and execute a writ of inquiry, he cannot afterwards move the court to set aside the proceedings for irregularity. *Smith v. John Patten*, sued by the name of *Joseph Patten*, 1 Mars. 474; 6 Taunt. 115.

8. A *subp. ad resp.* and attachment for want of appearance, in both of which there is a mistake in the defendant's surname, not sufficient ground for a rule to shew cause why the proceedings should not be set aside, although the defendant give the plaintiff notice, on being served with process, that he will move the court to set it aside, if proceeded in, and tender the plaintiff his demand. *Shaw v. Tytherleigh*, (sued by the name of *Tyther Leigh*), 2 Price, 328.

(h) How cured.

(h 1) By declaration in the right name.

1. A declaration against the defendant by a different name to that in the writ, is irregular, unless he has appeared in such name, and thereby estopped himself. An appearance entered for him by the plaintiff, not being his own act, does not estop him. *Doo v. Butcher*, 3 T. R. 611; *Delanoy v. Cannon*, 10 East, 328.

2. Declaration *de bene esse* against "Wason, sued by the name of Weston," by which name he had been arrested, is regular in *C. B.* *Symmers v. Wason*, 1 B. & P. 105. *Secus*, in *K. B.* *Delanoy v. Cannon*, 10 East, 328; even after interlocutory judgment. *Dring v. Dickenson*, 11 East, 225.

3. A defendant served with process by a wrong name, and who does not appear, cannot be declared against conditionally by his right name as sued by the other. *Greenslade v. Rotheroe*, 2 N. R. 132.

(h 2) By verdict.

After a verdict, where the defendant's name was put instead of the plaintiff's name, the court will reject the defendant's name as surplusage. *Richards v. Simmonds*, 3 Wils. 40.

(h 3) By amendment.

1. An appearance entered by plaintiff for defendant by a wrong name, amended after declaration. *Wheaton v. Packman*, 3 Wils. 49.

2. Where the name of the plaintiff is mistaken in the process, and in all the proceedings, the court will give him leave to amend while all is in paper. *Gardner v. Walker*, 3 Anst. 935.

3. After a plea in abatement of misnomer in the defendant's name, the plaintiff need not quash his proceedings, but may have leave to amend his bill and declaration conformable to the plea, even in penal actions. *Mestaer v. Hertz*, 3 M. & S. 450.

4. The rule that there must be something to amend by, does not apply exclusively to things which have arisen in the proceeding antecedent to the error. Hence, a plea in abatement of misnomer, giving the true name, is something by which to amend the bill and declaration. *Mestaer v. Hertz*, 3 M. & S. 450.

5. Where the defendant is rightly named in the affidavit to hold to bail, but misnamed in the process, and the bail-bond is given in his right name, adding "sued by the other," the process and sheriff's return, but without prejudice to the sheriff, will be amended, thereby making the sureties in the bail-bond liable. *Stevens v. Danvers*, 2 B. & P. 109.

(i) Plea of misnomer.

(i 1) Form of.

1. A plea of misnomer of the defendant must state that he is sued "by the plaintiff." *Jackson v. Ford*, 3 Wils. 413.

2. A plea of misnomer beginning "and he against whom, &c." is bad. *Docker v. King*, 5 Taunt. 652; *Peake v. Davis*, Id. 653, n.

3. A plea of misnomer of the defendant, beginning "and the said A. sued by the name of B." is bad, since thereby the defendant admits himself to be the person intended to be sued. *Jackson v. Ford*, 3 Wils. 413; *Roberts v. Moon*, 5 T. R. 487.

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4. The defendant, in a plea of misnomer of his christian name, must give his surname as well as his true christian name, although his true surname is used in the declaration. *Haworth v. Spraggs*, 8 T. R. 515; *Docker v. King*, 5 Taunt. 652; *Peake v. Davis*, Id. 653, n.

II. IN A PENAL INFORMATION.

(a) *How cured.*

(a 1) *By appearance.*

The court will not discharge a defendant out of custody on filing common bail, who has been arrested on a *capias*, describing him by his surname only, omitting his name of baptism, if he has appeared, although by a wrong christian name. *Sed quære*, if he had applied in the first instance, before appearance or plea? *Attorney General v. Kelsey*, 1 Price, 391.

III. IN CRIMINAL PROCEEDINGS.

(a) *Plea of misnomer.*

(a 1) *Whether pleadable in person or by attorney.*

In an indictment for a misdemeanour, the defendant may plead misnomer by attorney. *Rex v. Shakespeare*, 10 East, 83.

(a 2) *Form of.*

In an indictment for a misdemeanour, a plea of misnomer praying judgment of the indictment, and that he may not be compelled to answer the same, is good. *Rex v. Shakespeare*, 10 East, 83; *Rex v. Westby*, Id. 85, n.

(a 3) *Judgment thereon.*

On issue taken to a plea of misnomer in an indictment for a misdemeanour, and found against the defendant, the judgment is final. *Rex v. Gibson*, 8 East, 107.

MONEY HAD AND RECEIVED,

(Action for.)

I. WHEN MAINTAINABLE.

(a) *General rule*, p. 667.

(b) *For bank notes*, p. 667.

(c) *From the presumption of the sale of the plaintiff's property*, p. 667.

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(d) *For the proceeds of property taken under an execution against another*, p. 668.

(e) *For the proceeds of a conviction quashed*, p. 668.

II. WHEN NOT MAINTAINABLE.

(a) *General rule*, p. 668.

(b) *From the contract remaining open*, p. 668.

(c) *Where the contract is against conscience*, p. 668.

(d) *For stock*, p. 668.

(e) *To try a warranty*, p. 668.

(f) *To try the legality of a distress*, p. 668.

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III. PROPERTIES OF THE ACTION.

(a) *Questions of form are prohibited therein*, p. 668.

(b) *Inconveniences resulting from its generality, how guarded against*, p. 668.

IV. DAMAGES IN.

(a) *Measure of*, p. 668.

I. WHEN MAINTAINABLE.

(a) *General rule.*

1. Guarding the defendant from surprise, the action for money had and received cannot be too much encouraged. *Towers v. Barrett*, 1 T. R. 135.

2. The action for money had and received is in nature of a bill in equity; therefore to support it the plaintiff must shew that he has equity and conscience upon his side, and that he could recover in a court of equity. *Straton v. Rastall*, 2 T. R. 370.

(b) *For bank notes.*

Country bank notes may be treated as money, so as to recover their value by action of money had and received, where the parties have agreed to consider them as such. *Pickard v. Bankes*, 13 East, 20.

(c) *From the presumption of the sale of the plaintiff's property.*

Money had and received, will lie, if A. having obtained possession of goods en-

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trusted to B. by C. to be sold at a fixed price, refused either to return them to B. or to pay the fixed price, and B. being threatened with an action by C, pays him the price. *Longchamp v. Kenny*, Dougl. 137.

(d) *For the proceeds of property taken under an execution against another.*

Where goods are taken in execution which are not the property of the persons against whom execution is taken out; the owner may waive the trespass and bring money had and received for the price they fetched. *Feltham v. Terry*, Cowp. 419.

(e) *For the proceeds of a conviction quashed.*

In the case of goods taken in execution, and sold under a warrant of distress, under a conviction which is afterwards quashed; the owner may waive the tort and bring money had and received. *Feltham v. Terry*, Cowp. 419.

II. WHEN NOT MAINTAINABLE.

(a) *General rule.*

Questions cannot, without leave of the court, be discussed in the form of an action for money had and received, which could not be litigated in that form without the defendant's consent. *Marshall v. Hopkins*, 15 East, 309.

(b) *From the contract remaining open.*

Money had and received, will not lie when the money has been paid on a contract which the other party contends to be still open. *Weston v. Downes*, Dougl. 23. *Vide supra*, ASSUMPSIT.

(c) *Where the contract is against conscience.*

Will not lie where the bargain out of which it arises, is unconscionable. *Jestons v. Brooke*, Cowp. 793; *Plumbe v. Carter*, *Ibid*.

(d) *For stock.*

Money had and received will not lie for stock. *Nightingale v. Devisme*, 5 Burr. 2589; 2 Blk. 684.

(e) *To try a warranty.*

If money and a horse are given in exchange for another horse, warranted sound, which was unsound at the time, an action

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for money had and received, is not a proper action to try the warranty. *Power v. Wills*, Cowp. 818.

(f) *To try the legality of a distress.*

Money had and received does not lie to recover back money paid for the release of cattle wrongfully distrained as damage feasant. *Lindon v. Hooper*, Cowp. 414.

(g) *To try the question of priority between two executions.*

Though a sheriff is liable for seizing and selling under an extent to a creditor entitled to priority under a *f. fa.*, yet the form of action cannot be money had and received. *Thurston v. Mills*, 16 East, 254.

III. PROPERTIES OF THE ACTION.

(a) *Questions of form are prohibited therein.*

In an action for money had and received, neither party is allowed to entrap the other in form. *Stevenson v. Mortimer*, Cowp. 807.

(b) *Inconveniences resulting from its generality, how guarded against.*

A party cannot avail himself of the generality of a declaration for money had and received, to surprise the defendant. *Longchamp v. Kenny*, Dougl. 137.

IV. DAMAGES IN.

(a) *Measure of.*

In an action for money had and received, the plaintiff can recover no more than he is in conscience and equity entitled to; which can be no more than what remains after deducting all just allowance which defendant has a right to retain out of the sum demanded. *Dale v. Sollet*, 4 Burr. 2133.

MONEY LENT,

(Action for.)

WHEN MAINTAINABLE OR NOT.

(a) *Whether on an advance to a third person.*

Money advanced to a third person at defendant's request, cannot be recovered as money lent to that person. *Marriot v.*

MONEY PAID.

Lister, 2 Wils. 141; *Poorhead v. Smith*, 4 Blk. 874. Unless she be defendant's wife. *Stephenson v. Hardy*, 3 Wils. 388; 2 Blk. 872.

MONEY PAID,

(Action for.)

WHEN MAINTAINABLE OR NOT.

To support an action for money paid, an assent by the defendant to the payment, either express or implied, must be shewn. *Stokes v. Lewis*, 1 T. R. 20.

MONOPOLY.

GRANT OF.

- (a) *Implied conditions of*, p. 669.
- (b) *Action for the infringement of*.
- (b 1) *Declaration*, p. 669.

GRANT OF.

- (a) *Implied conditions of*.

Where a monopoly is granted to one or more individuals, they are bound to deal with the public on reasonable terms. *Allsutt v. Inglis*, 12 East, 527.

- (b) *Action for the infringement of*.
- (b 1) *Declaration*.

Where the inventor of an article is entitled to a monopoly therein (here under stat. 34 Geo. III, c. 23) upon compliance with certain conditions, for a certain time, in an action for an infringement of his right, an averment that the defendant invaded it within the period, and while the plaintiff was proprietor, and entitled to the monopoly, supplies, after verdict, the want of a specific averment that he had complied with the conditions. *Mackmurdo v. Smith*, 7 T. R. 518.

MORTGAGE.

I. RELATIVE TO THE EQUITY OF REDEMPTION.

- (a) *Its property of duration*, p. 669.

TO

MORTGAGE.

669

II. RELATIVE TO THE MORTGAGE OF PARCEL OF A TENEMENT.

- (a) *A right thereon to the title deeds*, p. 669.

III. RELATIVE TO THE EFFECT THEREON OF ADDITIONAL SECURITIES, p. 670.

IV. RELATIVE TO THE MORTGAGOR.

- (a) *Nature of his interest*, p. 670.
- (b) *Whether estopped disputing the title of the mortgagee*, p. 670.

V. RELATIVE TO THE MORTGAGÉE.

- (a) *What acts of the mortgagor shall enure to his benefit*, p. 670.
- (b) *On the priority of title between different mortgagees*, p. 670.

VI. MISCELLANEOUS.

- (a) *Redemption of, under the statute*, p. 670.
- (b) *Implied assent in the mortgagee to insure a personal mortgage*, p. 670.

I. RELATIVE TO THE EQUITY OF REDEMPTION.

- (a) *Its property of duration*.

If a mortgagee conveys, subject to the equity of redemption, that right may be kept alive for any length of time. *Doc, ex dem. Freestone, v. Parratt*, 5 T. R. 655.

II. RELATIVE TO THE MORTGAGE OF PARCEL OF A TENEMENT.

- (a) *Right thereon to the title-deeds*.

Part of an estate is mortgaged with the title-deeds. The remaining part is sold, with a covenant from the vendor to the vendee, to produce the deeds at any time when required. Afterwards, the mortgaged premises are assigned to the vendee, and with them the deeds; who again assigns the mortgaged premises to another, without mentioning the deeds. Held, that as the mortgagor being owner still of the other part of the premises, had as good a right to the deeds as the mortgagee, since they were not assigned, the mortgagee could not dispossess him by action. *Yea v. Field*, 2 T. R. 708.

III. RELATIVE TO THE EFFECT THERE- ON OF ADDITIONAL SECURITIES.

A mortgagee having filed a bill of foreclosure, and having proceeded to execution in ejectment, and being in possession of the rents and profits of 200 l. a year, under an ejectment, and having brought covenant for the mortgage money, and obtained execution, the court refused to discharge the defendant out of execution; for the plaintiff has a right to his remedy on all his securities. *Colby v. Gibson*, 3 Smith, 516.

IV. RELATIVE TO THE MORTGAGOR.

(a) *Nature of his interest.*

The legal interest of a mortgagor in possession is inferior to that of a mere strict tenant at will. *Dougl.* 22, 282.

(b) *Whether estopped disputing the title of the mortgagee.*

A mortgagor cannot set up the title of a third person against his mortgagee. *Doe*, ex dem. *Bristow*, v. *Pegge*, 1 T. R. 760, n.

V. RELATIVE TO THE MORTGAGEE.

(a) *What acts of the mortgagor shall enure to his benefit.*

If the lord of a manor mortgage the manor in fee to A, and afterwards purchase copyholds held of the manor, and take surrenders of them to himself in fee, they shall enure to the benefit of the mortgagee. *Doe*, d. *Gibbons*, v. *Pott*, *Dougl.* 710.

(b) *On the priority of title between different mortgagees.*

1. A mortgagee, by leaving the title-deeds in the mortgagor's possession, enables him to commit a fraud, and must therefore suffer for his neglect, in preference to a subsequent mortgagee without notice. *Goodtitle*, ex dem. *Norris*, v. *Morgan*, 1 T. R. 755.

2. Where the legal estate is standing out, the several incumbrances must be paid, according to their priority; and the legal estate is considered as standing out where the puisne incumbrancer has not acquired the better right to call for an assignment of it. Therefore, if an outstanding term, attendant on the inheritance, be assigned to a second mortgagee, with notice of a former mortgage, he

cannot avail himself of it against the first mortgagee, not only with respect to the incumbrance of which he has notice, but also with respect to another incumbrance, subsequent to the first but antecedent to his own, of which he has no notice. *Willoughby v. Willoughby*, 1 T. R. 763.

VI. MISCELLANEOUS.

(a) *Redemption of, under the statute.*

Where there are two or more mortgages, the court will not compel a redemption of one without the rest. *Roe*, d. *Kaye*, v. *Soley*, 2 Blk. 726.

(b) *Implied assent in the mortgagee to insure a personal mortgage.*

If the mortgagee of goods, after the mortgage has become absolute, receive instructions from the mortgagor to insure them, he must, if he intends to refuse, give notice to the mortgagor, that he may apply elsewhere, otherwise he will be taken to have assented. *Smith v. Lancelles*, 2 T. R. 187.

MURDER.

BY KILLING IN A DUEL.

The killing of another in a deliberate duel, from whatever provocation, is murder. *Rex v. Rice*, 3 East, 581.

NAVY.

I. OFFICERS OF.

(a) *Relative to their appointment*, p. 671.

(b) *Relative to their right to gratuity for carrying treasure*, p. 671.

(c) *Relative to their right to carry bullion*, p. 671.

(d) *Of their remedy for injuries done by their superiors*, p. 671.

(e) *Of their general duties, in relation to obedience*, p. 671.

(f) *Of their responsibility for the acts of their subordinate officers or crew*, p. 671.

(g) *Of their liability for necessities supplied to the crew*, p. 671.

(h) *Of their responsibility on the carriage of goods*, p. 671.

II. SEAMEN.

(a) *Penalties for the discharge of, when taken out of the service by process*, p. 671.

III. NAVY AGENT.

(a) *Payments by, when protected*, p. 672.

(b) *Penalty under 31 Geo. II, c. 10, how incurred by*, p. 672.

IV. NAVAL STORES.

(a) *Convictions relative to.*

(a 1) *Judgment in*, p. 672.

(a 2) *Costs of*, p. 672.

I. OFFICERS OF.

(a) *Relative to their appointment.*

The appointment of officers, and the particular number, to ships, is wholly in the discretion of the admiralty, from the extensive powers vested in them by their commission, and is therefore independent of, and uncontrollable by, the orders of the crown; which, when given, are merely directory, and do not avoid a commission or appointment made in opposition to them. *Waterhouse v. King*, 2 East, 507.

(b) *Relative to their right to gratuity for carrying treasure.*

A flag-officer has no right to share in the gratuity given to a captain, under his orders, for carrying treasure; nor, *comme semble*, in the freight received by the captain for carrying that of individuals. *Montagu v. Janverin*, 3 Taunt. 442.

(c) *Relative to their right to carry bullion.*

1. The commander of a king's ship may lawfully carry bullion. *Hodgson v. Fullarton*, 4 Taunt. 787.

2. The commander of a ship of war cannot, unless authorized, lawfully carry private bullion on freight. *Brisbane v. Dacres*, 5 Taunt. 143.

(d) *Of their remedy for injuries done by their superiors.*

1. *Semble*, that no action lies by a sub-

ordinate officer against his superior officer, for an act done, however maliciously, and without even probable cause, in the course of discipline, and under powers incident to his situation, upon the same principles of public policy and convenience which protect judges, &c. from private suits. *Sutton v. Johnstone*, 1 T. R. 493.

2. No action lies for delaying to bring an officer, under arrest, to a court martial. *Johnstone v. Sutton*, in error, 1 T. R. 548, 704.

(e) *Of their general duties in relation to obedience.*

A subordinate officer must not judge of the propriety of the order he receives; he must obey it, unless obedience be physically impossible, when his disobedience is justifiable. *Johnstone v. Sutton*, in error, 1 T. R. 546, 784.

(f) *Of their responsibility for the acts of their subordinate officers or crew.*

The relation of master and servant does not subsist between the captain of a ship of war and his officers or seamen; therefore he is not answerable for their negligence. *Nicholson v. Mouney*, 15 East, 384.

(g) *Of their liability for necessities supplied to the crew.*

Where a crew are supplied with necessities, at the instance of one of its officers, to a considerable amount, and an intention on his part to be personally liable, does not clearly appear, the presumptions are in his favour. *Keate v. Temple*, 1 B. & P. 158.

(h) *Of their responsibility on the carriage of goods.*

The captain of a ship in the king's service, receives at Gibraltar, bullion to be brought to this country for freight, giving a bill of lading for it. The ship arrives, but the bullion is lost. Held, that whether it were illegal or not under 22 Geo. II, c. 33, s. 24, for the captain to receive the bullion on board, at all events he was answerable for the loss of it. *Hatchwell v. Cooke*, 2 Mars. 293; 6 Taunt. 577.

II. SEAMEN.

(a) *Penalties for the discharge of, when taken out of the service by process.*

By "officers," in the stat. 44 Geo. III,

c. 13, s. 4, are meant, officers to whom execution of the process has been delegated by the court, whence it emanated. *Sturmy v. Smith*, 11 East, 25.

III. NAVY AGENT.

(a) *Payments by, when protected.*

It seems, that ship agents will not be discharged in making any of the payments mentioned in stat. 26 Geo. III, c. 63, s. 1, under any other authority than a power of attorney in the form prescribed therein. *Macdonald v. Pasley*, 1 B. & P. 161.

(b) *Penalty under 31 Geo. II, c. 10, how incurred by.*

1. A lieutenant in the navy is empowered to draw for his pay every three months. The agent who makes up his accounts, is entitled to 6*d.* in the pound only upon the balance actually received and paid by him, the agent; and if, through mistake of the law, he deducts in such case upon the whole sum paid by government, he incurs the penalty of 31 Geo. II, c. 10, s. 30: *Walsh v. Toulmin*, 2 Smith, 607; 6 East, 541.

2. Stat. 31 Geo. II, c. 10, s. 30, applies to a lieutenant. *Walsh v. Toulmin*, 2 Smith, 607; 6 East, 541.

IV. NAVAL STORES.

(a) *Convictions relative to.*

(a1) *Judgment in.*

1. It is in the discretion of the court to adjudge either corporal punishment, or the 200*l.* penalty, against one convicted of having concealed naval stores, or of having them in his custody. *Rex v. Bland*, 5 T. R. 370. And the penalty may be mitigated. *Lofft*, 27.

2. The power of sentencing to hard labour one convicted on stat. 9 & 10 Will. III, c. 41, s. 2, for having unlawfully in his possession, or concealing naval stores, is taken away by stat. 39 & 40 Geo. III, c. 89, s. 2. *Rex v. Bridges*, 8 East, 53.

(a2) *Costs of.*

Costs may be adjudged against one convicted of having concealed naval stores, or of having them in his custody. *Rex v. Chapple*, 5 T. R. 371, n.(a).

NEWSPAPER.

I. RELATIVE TO THE PUBLISHER.

(a) *Proof of*, p. 672.

II. RELATIVE TO THE PUBLICATION.

(a) *Proof of*, p. 672.

I. RELATIVE TO THE PUBLISHER.

(a) *Proof of.*

To prove the defendant is the publisher of a newspaper, evidence that he gave a bond to the stamp office for payment of the duties, and had occasionally applied there on the subject, is sufficient. *Rex v. Topham*, 4 T. R. 126. See 38 Geo. III, c. 78.

II. RELATIVE TO THE PUBLICATION.

(a) *Proof of.*

1. The affidavit and newspaper produced, pursuant to the stat. 38 Geo. III, c. 78, are proof that the publication was in the county in which the printing is described to be. *Rex v. Holt*, 10 East, 94.

2. The provisions of the 11th sect. of stat. 38 Geo. III, c. 78, apply to plaintiffs in civil and prosecutors in criminal suits, as well as to persons seeking to recover penalties under it. *Rex v. Hart*, 10 East, 94.

NEW TRIAL.

I. IN CIVIL CASES.

(a) *When granted or refused.*

(a1) *General rules*, p. 673.

(a2) *In penal actions*, p. 674.

(a3) *In ejectment*, p. 674.

(a4) *On an issue from a court of equity*, p. 674.

(a5) *Miscellaneous instances in which it has been granted*, p. 674.

(a6) *Miscellaneous instances in which it has been refused*, p. 675.

(a7) *By an inferior court*, p. 675.

(a8) *As to one of several issues*, p. 675.

(b) *Grounds for.*

(b1) *General rules*, p. 675.

(b2) *The manner of summoning the jury*, p. 675.

(b3) *The jury not being those intended*, p. 675.

- (b 4) *Attempt to influence the jury*, p. 675.
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- (b 7) *Mistake of a witness*, p. 676.
- (b 8) *Incompetency of a witness*, p. 676.
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- (b 11) *Discovery of new evidence*, p. 676.
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- (b 15) *Negligence in the counsel*, p. 676.
- (c) *Terms of*.
 - (c 1) *With or without costs*, p. 676; and see *infra*, (f).
- (d) *Motion for*.
 - (d 1) *Matter of, how regulated*, p. 676.
 - (d 2) *Notice of, to the judge who tried the cause*, p. 677.
 - (d 3) *When made*, p. 677.
 - (d 4) *Affidavits in support of, —subject matter of*, p. 677.
 - (d 5) *Affidavits in support of, —by whom made*, p. 677.
 - (d 6) *Form of*, p. 677.
 - (d 7) *On an issue out of Chancery, —where made*, p. 677.
 - (d 8) *After the reservation of a special case*, p. 677.
- (e) *Rules for*.
 - (e 1) *Entry of*, R. 626.
 - (e 2) *When*.
- (f) *Relative to* for *supra*, *general rules*.
 - (f 1) *Importance are not alone*
 - (f 2) *King a new trial; though weigh in granting a rule*
- (g) *Of v. Hankey*, 2 T. R. 113.
- (rule relative to the granting of this: It must clearly and

II. IN CRIMINAL CASES.

- (a) *When granted or refused*.
 - (a 1) *General rules*, p. 678.
 - (a 2) *After an acquittal*, p. 678.
 - (a 3) *As to some defendants*, p. 678.
- (b) *Grounds*.
 - (b 1) *Admission of improper evidence*, p. 678.
- (c) *Motion for, when made*, p. 679.

I. IN CIVIL CASES.

- (a) *When granted or refused*.
 - (a 1) *General rules*.

1. An application for a new trial is to the discretion of the court, who will exercise it in such a manner as will best answer the ends of justice. If they see that those ends have been fulfilled, they will not grant a new trial upon a technical objection, such as a misdirection of the judge. *Edmonson v. Machell*, 2 T. R. 4; 4 Lofft. 521.

2. On applying for a new trial, the only question is, whether, under all the circumstances, the verdict be or be not according to justice, without regarding any slip which the judge may have made in his direction. *Estwick v. Cailland*, 5 T. R. 425; Lofft. 521.

3. A new trial will be refused, unless the objection on which, &c. either was, or could not have been made at the trial. *Vernon v. Hankey*, 2 T. R. 113; *Rogers v. Stevens*, 2 T. R. 713; *Petrie v. White*, 3 T. R. 8; *Harford v. Wilson*, 1 Taunt. 12; *Halliwell v. Trapples*, 2 Taunt. 55; *Astley v. Ray*, Id. 217, n. (a).

4. Where the question is involved in great doubt and obscurity, is of great value, and binds the right for ever, the court will grant a new trial, where in an ordinary case they would refuse it. *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

5. A new trial will not be granted in a *cause*. *Reaveley v. Mainwaring*, 1. Sutt. 6.

shall not *ad. All trial by a competent according to light can be thrown in, v. Stevenson*, if not be granted. *Camden* 2. The *sutt.* 418.

man to the trial will not be granted jury drew lots see that the issue of the

second trial will be similar to that of the first. *Watkins v. Towers*, 2 T. R. 275.

8. Where a verdict is consonant to equity, a new trial will not be granted, unless on a legal objection; not, therefore, on the ground that the facts proved did not sufficiently warrant the inference drawn by the jury. *Wilkinson v. Payne*, 4 T. R. 459.

9. A verdict against evidence will not be set aside, and a new trial granted, where the damages do not exceed 5*l*. *Roberts v. Karr*, 1 Taunt. 495. And see *Marsh v. Bower*, 2 Blk. 851.

10. A nonsuit will not be set aside, on the ground that the case should have been left to the jury, unless that was requested at the trial. *Kindred v. Bagg*, 1 Taunt. 10.

11. A new trial will not be granted for the improper rejection of a witness which, in the event, proved unimportant. *Edwards v. Evans*, 3 East, 451.

12. An application for a new trial, because evidence was improperly admitted, will be refused, where the other evidence adduced was sufficient to warrant the verdict. *Horford v. Wilson*, 1 Taunt. 12.

13. If, on the judge stating his opinion to the jury, the plaintiff elects to be nonsuited, he cannot demand a new trial, on the ground that the direction was erroneous. *Butler v. Dorant*, 3 Taunt. 229.

14. A new trial will not be granted because the judge differed from the jury as to the preponderance of the evidence, where on a former trial the verdict was the same. *Swinerton v. Marquis of Stafford*, 3 Taunt. 232.

15. Where a verdict is consonant to the equity of the case, a new trial will not be granted on a point of law which was not reserved. *Cox v. Kitchen*, 1 B. & P. 338.

16. No motion for a new trial on a point abandoned at the trial. *Robinson v. Cook*, 6 Taunt. 336.

17. The court will order a new trial on questions deciding important rights, where the judge expressed an opinion on a trial, contrary to the verdict, although afterwards report that he was satisfied with the finding of the *Earl of Mount Edgecombe* against one Price, 278.

18. Where there are two sealed naval dicta, and the latter is satisfied in (a). court, the losing party is

any rule or practice to a third trial. *Parker v. Ansell*, 2 Blk. 963.

19. A new trial may be granted after two concurring verdicts. *Goodwin v. Gibbons*, 4 Burr. 2108.

(a 2) In penal actions.

1. After verdict for defendant in a penal action, a new trial shall never be granted. *Fonereau v. —*, 3 Wils. 59.

2. In a penal action, where the jury having had the case fairly stated to them, find a verdict for the defendant, however mistaken, the court will not grant a new trial. *Secus*, where they have been misdirected. *Wilson v. Rastall*, 4 T. R. 753; *Calcraft v. Gibbs*, 5 T. R. 19.

3. A verdict for the defendant in a penal action will not be set aside, because against evidence. *Brook v. Middleton*, 10 East, 268.

(a 3) In ejectment.

A new trial may be granted in ejectment. *Goodtitle, d. Alexander, v. Clayton*, 4 Burr. 2224; *Clymer v. Littler*, 1 Blk. 348.

(a 4) On an issue from a court of equity.

Where the court of Chancery directs an action at law, even in cases where such action could not be maintained without its direction, as where the defendant therein is a certificated bankrupt, it does not consider the action as tried, unless the court at law is satisfied with the verdict. Until that event, therefore, such court has full dominion over the suit, and may direct a new trial, if dissatisfied with the verdict. *Carstairs v. Stein*, 4 M. & S. 192.

(a 5) Miscellaneous instances in which it has been granted.

1. A new trial was granted, although there was evidence on both sides, because all the witnesses subscribing to a release were not read and examined. *Norris v.*

(a 7) *Id.* 38.

it, by an executor for

(a 8) Answered, the delivery was p. 225, but he also swore

(b) Grounds for with the deceased,

(b 1) General paper written by

(b 2) The man said to have been the jury; the jury found

(b 3) The jury not for 8*l*. 14*s.*, intended, pillness of the

debt, a new trial was granted. *Madge v. Fear*, 1 Smith, 409.

(a 6) *Miscellaneous instances in which it has been refused.*

1. In trespass, the defendant prescribed for a way over the close in which, &c. and mistook the *terminus a quo* in his plea; there was a verdict for the defendant; new trial refused, the merits having been tried. *Bampeon v. Appleyard*, 3 Wils. 272.

2. In an action for a malicious prosecution, the court refused to set aside a verdict for the defendant, though against evidence. *Norris v. Tyler*, Cowp. 37.

3. If a plaintiff recovers upon a contract which, though illegal in fact, is legal upon the face of it, from the defendant having neglected at the trial to prove the circumstances which rendered it illegal, the court will not grant a new trial to let in such proof. *Gist v. Mason*, 1 T. R. 84.

4. After a verdict for the plaintiff in an action for negligence, a new trial will not be granted, on the ground that the accident probably resulted in part from the plaintiff's own negligence. *Collinson v. Larkins*, 3 Taunt. 1.

5. If the jury find, that words directly charging the plaintiff with being a murderer and having murdered his brother, were spoken by the defendant, but not maliciously, on which a verdict be recorded for the defendant, the court will not grant a new trial on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had accidentally been the cause of his brother's death. *Wilson v. Stephenson*, 2 Price, 282.

(a 7) *By an inferior court.*

An inferior court cannot grant a new trial. Dougl. 380.

(a 8) *As to one of several issues.*
May be granted. 6 T. R. 626.

(b) *Grounds for.*

(b 1) *General rules.*

1. Value and importance are not alone grounds for granting a new trial; though they frequently weigh in granting a rule *mn.* *Vernon v. Hankey*, 2 T. R. 113.

2. The rule relative to the granting of new trials is this: It must clearly and

manifestly appear, that the jury have given their verdict under a misconception of the law; or have given it believing what they ought to have disbelieved, or disbelieving what they ought to have believed. The rule of law which ought to govern a particular case, can always be ascertained; the state of facts is frequently doubtful, when it is peculiarly the province of the jury to decide the question; and wherever there is room to doubt, the court will not grant a new trial, because the inclination of their opinion is at variance with the verdict of the jury. The opposition then is merely opinion against opinion; hypothesis opposing hypothesis; not truth and certainty, and manifest falsehood and error. *Carstairs v. Stein*, 4 M. & S. 192.

(b 2) *The manner of summoning the jury.*

The attorney for the defendant being under-sheriff and having summoned the jury, is no ground for a new trial after a verdict for the defendant in a case of contradictory evidence. *Mason v. Vickery*, 1 Smith, 304.

(b 3) *The jury not being those intended.*

A verdict, whether in a criminal or civil case, will not be set aside because one of the jury was not the party intended. *Hill v. Yates*, 12 East, 229; *Anon.* Id. 2312.

(b 4) *Attempt to influence the jury.*

Where in a *qui tam* action for usury, the principal witness, the borrower, had distributed a printed memoir containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them; held, that the discovery of this circumstance after the trial, was not a sufficient cause for a new trial. *Spencely v. De Willott*, 3 Smith, 321; 7 East, 108.

(b 5) *Misdemeanor of the jury,—how proved.*

1. Subsequent declarations of the jury shall not vitiate a general verdict given according to the merits of the case. *Clark v. Stevenson*, 2 Blk. 803.

2. The subsequent confession of a jurymen to the defendant's attorney, that the jury drew lots which six of them should

determine the verdict, not otherwise proved to the court, is no ground for a new trial. *Aylett v. Jewel*, 2 Blk. 1299.

(b 6) *Surprise.*

In case of a verdict taken in the absence of a party and his solicitor, the court will, in some instances, order a new trial, if reasonable cause be shewn. *Beazley v. Shapleigh*, 1 Price, 201.

(b 7) *Mistake of a witness.*

1. If a plaintiff is nonsuited through the mistake of his witness in a material circumstance, a new trial ought to be granted. *De Gion v. Dover*, 2 Anst. 516.

2. Where the facts, upon which the witnesses themselves founded their testimony, are falsified by affidavit, a new trial will be granted. *Lister v. Mundell*, 1 B. & P. 427.

3. In an action on a policy, where the defendant, by the mistake of his witness, failed in producing the necessary document from the Admiralty, for proving a breach of the Convoy Act, the court granted a new trial, in order to let him into this defence after verdict found for the plaintiff on the merits. *D'Aguilar v. Tobin*, 3 Marshall, 265.

(b 8) *Incompetency of a witness.*

An objection to the competency of a witness must be made at the trial; and a new trial will not be granted, because it has since been discovered that the witnesses were interested; though that fact may have some weight with the court where the party shews that he has merits. *Turner v. Pearle*, 1 T. R. 717.

(b 9) *Discovery of subornation.*

Discovery since the trial, that witnesses had been suborned, is a ground for a new trial. *Fabrilus v. Cock*, 3 Burr. 1771.

(b 10) *Conviction of a witness.*

The court will not, after verdict, arrest a judgment, on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial.—Nor does it seem, that a conviction would be sufficient ground for sending a cause back to a jury for re-investigation. *Attorney General v. Woodhead*, 2 Price, 3.

(b 11) *Discovery of new evidence.*

Discovery of new evidence by the attorney of an executor defendant (then absent from England), though in the actual custody of the attorney himself, yet not known by him so to be, is a ground for a new trial. *Broadhead v. Marshall*, 2 Blk. 955; Loft. 160.

(b 12) *Conflicting verdicts.*

A new trial will not be granted because another jury in a cause nearly similar, gave a different verdict. *Spong v. Hog*, 2 Blk. 802.

(b 13) *The point in a bill of exceptions.*

Where there is a bill of exceptions a new trial shall not be moved for on the point of law contained therein. *Fabrigas v. Mostyn*, 1 Blk. 929.

(b 14) *Negligence in the attorney.*

Where a cause is undefended, through the attorney's neglect to deliver a brief, a new trial will be granted, and the attorney compelled to pay all cost as between attorney and client. *De Ronfigney v. Peale*, 3 Taunt. 484.

(b 15) *Negligence in the counsel.*

A new trial will not be granted because the counsel thought it prudent to omit evidence which they had in their briefs. *Spong v. Hog*, 2 Blk. 802.

(c) *Terms of.*

(c 1) *With or without costs.*

1. Where a plaintiff refuses, against the opinion of the judge, to be nonsuited, and has a verdict, a new trial shall be without costs. *Pochin v. Pawley*, 1 Blk. 670.

2. Where a plaintiff submits to an erroneous nonsuit, a new trial shall be without costs. *Pochin v. Pawley*, 1 Blk. 670.

3. There is no rule against giving costs on a new trial being granted, although the verdict was against the opinion of the judge. *Gosley v. Barlow*, 1 Anst. 47.

4. A rule for a new trial, upon grounds not opened at the former trial, will be made absolute only on payment of costs. *Sutton v. Mitchell*, 1 T. R. 18.

(d) *Motion for.*

(d 1) *Matter of, how regulated.*

A motion for a new trial must be dis-

cussed on the line taken by the leading counsel at the trial, though contrary to the opinion of the junior. *Pickering v. Dawson*, 4 Taunt. 779.

(d 2) *Notice of, to the judge who tried the cause.*

1. Two days notice to be given of motion for new trial. C. B. Mich. 53 Geo. III; 4 Taunt. 721.

2. No motion for a new trial, unless the court is certified that the judge has had due notice. 5 Taunt. 86.

(d 3) *When made.*

1. The court will, under particular circumstances, permit a motion for a new trial to be made, though the four days be elapsed. *Dickinson v. Fisher*, 1 Blk. 664.

2. The court will grant a new trial, under particular circumstances, after the four days are elapsed. *Birt v. Barlow*, Dougl. 171. And at any time before judgment. *Rex v. Gaugh*, Dougl. 797.

(d 4) *Affidavits in support of,—subject matter of.*

The court will not, on a motion for a new trial, hear the affidavit of any facts which might have been brought forward at *nisi prius*. *Hope v. Atkins*, 1 Price, 143.

(d 5) *Affidavits in support of,—by whom made.*

Where there is a doubt upon the judge's report, as to what passed at the time of bringing in the verdict, the affidavit of jurors or bye-standers may be received upon a motion for a new trial, or to rectify a mistake in the minutes. *Rex v. Woodfall*, 5 Burr. 2667.

(d 6) *On an issue out of chancery,—where made.*

A new trial in an issue out of chancery must be first moved for in that court, though the motion be founded on an improper rejection of evidence. *Bowker v. Nixon*, 6 Taunt. 444. See *vide supra*.

(d 7) *After the reservation of a special case.*

It seems where a special case has been reserved, a new trial has been granted, VOL. II.

without previously setting aside the verdict. Loft. 451.

(e) *Rules for.*

(e 1) *Entry of.*

Rule as to entering rules for new trials which stand over from one term to another in the peremptory paper. K. B. Hil. 44 Geo. III; 1 Smith, 198.

(e 2) *When opposed.*

If no one appear to shew cause against a rule *nisi* for a new trial on the peremptory order day, the rule will be made absolute. *Parsons v. Nix*, 1 Price, 312.

(f) *Relative to costs.*

(f 1) *Of the first trial.*

1. Where in a rule for a new trial, nothing is said about the costs of the former, the costs of the first trial are never allowed in K. B. although the second trial terminate in favour of the same party as the first. *Mason v. Skurray*, Dougl. 438; *Hankey v. Smith*, 3 T. R. 507; *Smith v. Haile*, 6 T. R. 71, 131, 144; *Booth v. Atherton*; *Austen v. Gibbs*, 8 T. R. 619; *Bird v. Appleton*, 1 East, 111; *Robertson v. Liddell*, 10 East, 416.

2. Where a case reserved is sent down to be re-stated, the party succeeding at the second trial is not entitled to the costs of the first. *Smith v. Haile*, 6 T. R. 71.

3. Where a case reserved is sent down to be re-stated, and the defendant, without going to trial, gives a cognovit, the plaintiff is entitled to the costs of the first trial. *Booth v. Atherton*, 6 T. R. 144.

4. Where upon setting aside a nonsuit, the costs are directed to abide the event, although the plaintiff succeed on the second trial, he is not entitled to the costs of the first; nor is the defendant. But in case where the costs are directed to abide the event, the same party succeeds on both trials, he is entitled to the costs of both. *Austen v. Gibbs*, 8 T. R. 619. See *Chapman v. Partridge*, 2 N. R. 382.

5. In the C. B. where a cause has been twice tried, and the same party who succeeded on the first trial, gains a verdict also upon the second, he is allowed the costs of both trials, although the rule for the second trial be silent as to the costs of the first. But where the first verdict is for the plaintiff, and the second for the defendant, or *e converso*, there the party

ultimately succeeding has *not* the costs of the first trial, even though the rule direct that the costs of the former trial shall abide the event. *Parker v. Wells*, 1 H. B. 639; *Trelawney v. Thomas*, Id. 641; *Chapman v. Partridge*, 2 N. R. 382.

6. Where, upon a second trial, a juror is withdrawn, on the party who obtained the verdict at the first trial, undertaking generally to pay the other party his costs, such an undertaking extends only to the costs of the second trial. *Rouse v. Bardin*, 1 H. Bl. 639.

7. Costs of first trial gained by the defendant's forgery, refused to plaintiff succeeding on second trial. *Goodtitle, d. Bremridge, v. Walter*, 4 Taunt. 671.

8. Where the jury find an *insufficient* verdict, upon which the court can give no judgment, and a new trial is granted, the party ultimately successful is not entitled to the costs of the former trial. *The Worcestershire and Staffordshire Canal Company v. The Trent and Mersey Navigation Company*, 2 Mars. 475.

9. If a cause come on for trial, and be referred, and the arbitrator's award in favour of the plaintiff should afterwards be set aside, so that in consequence the cause be subsequently tried; the plaintiff, if he should also succeed on that occasion, will be allowed the costs of the former trial. *Poole v. Selwood*, 1 Price, 310.

(f 2) *Of the rule,—in a particular instance.*

Where on discussing a rule *nisi* for a nonsuit, after verdict for a total loss, the court determine that the verdict is wrong, but that the plaintiff is entitled to a return of premium, neither party can claim the costs of the rule. *Spitta v. Woodman*, 3 Taunt. 406.

(g) *Of a venire de novo.*

(g 1) *When grantable.*

1. A *venire de novo* can only be awarded where the verdict is defective, so that no judgment can be given. *Goodtitle, ex dem. Jones, v. Jones*, 7 T. R. 43.

2. Where entire damages are assessed upon the whole declaration, and some counts are defective, a *venire de novo* will not be awarded, and therefore the judgment will be arrested. *Holt v. Scholefield*, 6 T. R. 691; see Doug. 377.

(g 2) *Of the costs on.*

The successful party on a *venire de novo*,

is only entitled to the costs of the last trial. *Lickbarrow v. Mason*, 6 T. R. 131.

II. IN CRIMINAL CASES.

(a) *When granted, or refused.*

(a 1) *General rules.*

1. A new trial, after conviction, may be granted, unless where the crime is higher than a misdemeanor. *Rex v. Mawbey*, 6 T. R. 619.

2. After a conviction of an offence less than felony, the court of K. B. will, in its discretion, grant a new trial, whenever it is manifestly conducive to the ends of justice. In strictness the defendant should apply within the time limited in civil cases: but for the attainment of substantial justice, the court will interpose after the regular time has elapsed. *Rex v. Waddington*, 1 East, 143.

(a 2) *After an acquittal.*

The rule that a new trial will not be granted in a criminal case where the defendant has been acquitted;—*Rex v. Praed*, 4 Burr. 2257; *Lofft*, 391;—admits no exceptions; it applies therefore to the case of an indictment for a nuisance. *Rex v. Mann*, 4 M. & S. 337.

(a 3) *As to some defendants.*

Where in an indictment against several, unless for a crime higher than a misdemeanor, some are acquitted, the others found guilty; a new trial as to those convicted may be granted. And it seems that the entry on the record may be either, 1. Altering the first *venire*, by striking out the names of those defendants who were convicted, and then awarding a second *venire* to try them; or, 2. by stating that the verdict against these was improperly given, and then to award a new trial so far as respects them. *Rex v. Mawbey*, 6 T. R. 619.

(b) *Grounds.*

(b 1) *Admission of improper evidence.*

If in a criminal proceeding some evidence be adduced which should have been excluded, and a verdict pass against the defendant, a new trial will be granted, since there are no means of ascertaining whether the other portion of evidence alone weighed with the jury, or whether they were not influenced by that impro-

party adduced. *Res v. Sutton*, 4 M. & S. 532.

(c) *Motion for, when made.*

The rule, confining a motion for a new trial to the four first days of the term, applies as well to criminal as civil cases; but if in the course of an address in mitigation of punishment, or otherwise, it appear that justice has not been done, the court will of themselves interpose, and grant a new trial. *Firth v. Purvis*, 5 T.R. 432; and see *Res v. Waddington*, 1 East, 143.

(d) *Form of.*

On moving for a new trial in a criminal case, all convicted must be present in court. *Res v. Teal*, 11 East, 307.

NORFOLK CIRCUIT.

(a) *Clerk of Assize to.*

(a 1) *Fees of.*

The fee due to the clerk of the assize, under the st. 19 Geo. III, c. 74, is on the Norfolk circuit, one guinea. *Fleetwood v. Finch*, 2 H. B. 220.

NORWICH.

I. SHERIFF OF.

(a) *Statutes relative to*, p. 679.

II. CORPORATION OF.

(a) *Construction of its charter*, p. 679.

I. SHERIFF OF.

(a) *Statutes relative to.*

By st. 9 Geo. I, c. 9, s. 3, any person elected sheriff of Norwich, worth 3,000 l. may be excused serving the office on payment of a fine; but no person shall be discharged longer than one year without the consent of the mayor, &c. The act is to be construed according to the obvious import of the words. *Res v. Woodrow*, 2 T.R. 731.

II. CORPORATION OF.

(a) *Construction of its charter.*

Who are inhabitants within the char-

ter of Norwich. *Res v. Mitchell*, 10 East, 511.

NOTICE,

CONSTRUCTIVE.

The nature of *constructive* notice explained. *Plumb v. Flutt*, 2 Anst. 438.

NUISANCE.

I. PUBLIC.

(a) *What are considered as.*

(a 1) *General rule*, p. 679.

(a 2) *Particular instances*, p. 679.

(b) *The question whether, how determined.*

(b 1) *On motion*, p. 680.

(c) *Of the judgment on conviction as*, p. 680.

(d) *Of the abatement of, under a statute.*

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II. OF INJURIES RESULTING FROM.

(a) *When actionable*, p. 680.

(b) *Of the action for.*

(b 1) *Venue in*, p. 680.

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(b 3) *Declaration in, — detail of circumstances*, p. 680.

(c) *Whether remediable by personal interference*, p. 680.

I. PUBLIC.

(a) *What are considered as.*

(a 1) *General rule.*

Semble, that an act to be indictable as a nuisance, need not have produced actual injury. It is sufficient, if in its nature and circumstances it be capable of producing it. *Res v. Vantandillo*, 4 M. & S. 73.

(a 2) *Particular instances.*

1. *Semble*, a stoppage in the streets for the purpose of unloading waggons at an inn or warehouse, may, by its frequency, become a nuisance. *Res v. Russell*, 2 Smith, 424; 6 East, 427.

2. Unlawfully, injuriously, and with full knowledge of the fact, to expose in a public highway, a person infected with a contagious disease; such as the small-pox, is a common nuisance, and indictable as such. *Rex v. Vantandillo*, 4 M. & S. 73.

(b) *The question whether, how determined.*

(b 1) *On motion.*

The court will not try whether a joint stock company be a nuisance, on a motion to set aside a judgment confessed to them. *Brown v. Holt*, 4 Taunt. 587.

(c) *Of the judgment on conviction as.*

1. Upon a conviction for a nuisance, the judgment is to be adapted to the nature of the offence alleged; if there be no allegation of the continuance, up to the time of taking the inquisition, judgment that it be abated is unnecessary; if a continuance be alleged, prostration should be awarded. *Rex v. The Justices of the West Riding of Yorkshire*, 7 T. R. 467; *Rex v. Stead*, 8 T. R. 142.

2. Upon conviction for a nuisance, of which a continuance was alleged, judgment of prostration will not be given by the court of K. B. if they be satisfied that the nuisance has been already effectually abated. *Rex v. Incledon*, 13 East, 164.

(d) *Of the abatement of, under a statute.*

(d 1) *Appeal from.*

Where an act empowers commissioners to abate nuisances, on neglect by the owner after notice in writing, and gives an appeal to the quarter sessions "against any matter or thing to be done by the commissioners in pursuance of the act," an appeal lies against such notice. *Rex v. Kingston*, 8 East, 41.

II. OF INJURIES RESULTING FROM.

(a) *When actionable.*

1. No action lies for an injury from a nuisance, which, with ordinary care, might have been avoided. *Butterfield v. Forrester*, 11 East, 60.

2. B. moors a barge across a public navigable creek, whereby A, who is navigating along the creek, is forced to unload his cargo and carry it over-land, thereby incurring considerable expense. Held, that this was a particular damage beyond what the rest of the community had sustained,

OATH, ILLEGAL.

sufficient to entitle him to an action. *Ross v. Miles*, 4 M. & S. 101.

(b) *Of the action for.*

(b 1) *Venue in.*

An action for the consequences of a nuisance affecting real property, whether corporeal or incorporeal, is local, and must be brought where the property affected is situate. *The Company of Proprietors of the Mersey and Irwell Navigation v. Douglas*, 2 East, 497.

(b 2) *Declaration in,—local description.*

1. In an action for a nuisance, to which no local description is annexed, it will be presumed to be situated in the county in the margin. *Warren v. Webb*, 1 Taunt. 379.

2. In an action for a nuisance, occasioned by a neglect to repair a spout, the declaration stated, that the defendant suffered it to be out of repair at A, in the county of B; held, that this was an averment that the spout was situate there. *Warren v. Webb*, 1 Taunt. 379.

(b 3) *Declaration in,—detail of circumstances.*

In a declaration for a nuisance, the proximate cause of the injury must be stated; and it is not competent to state the remote cause, and give all the intermediate matters in evidence, under the allegation, that by means thereof the injury was occasioned. *Fitzsimons v. Inglis*, 5 Taunt. 534.

(c) *Whether remediable by personal interference.*

If a man in his own soil erect a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle, the party injured may enter on the soil of the other and abate the nuisance and justify the trespass; and this right of abatement is not confined merely to nuisances to a house, to a mill, or to land. *Raikes v. Townsend*, 2 Smith, 9.

OATH, ILLEGAL.

I. INDICTMENT FOR.

(a) *Form of averment*, p. 681.

(b) *Evidence in*, p. 681.

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to

OFFICE AND OFFICER. 681

II. STATUTE RELATIVE TO.

- (a) 37 Geo. III, c. 123,—to what oaths applicable, p. 681.

I. INDICTMENT FOR.

- (a) Form of averment.

In an indictment on 37 Geo. III, c. 123, it is sufficient to allege and prove what the object of the oath and engagement was, without stating its tenor or purport. *Rex v. Moors*, 6 East, 419, n.

- (b) Evidence in.

1. Parol evidence may be given of the oath, without notice to produce the paper from which it was supposed the defendant read it. *Rex v. Moors*, 6 East, 421, n.

2. Declarations made at the time by the party administering the oath, are evidence to explain the real design of it. *Rex v. Moors*, 6 East, 421, n.

II. STATUTE RELATIVE TO.

- (a) 37 Geo. III, c. 123,—to what oaths applicable.

The stat. 37 Geo. III, c. 123, against unlawful oaths, is not limited to those administered for the purposes of mutiny and sedition, but extends to all cases of illegal combination. *Rex v. Marks*, 3 East, 157.

OFFICE AND OFFICER.

I. OFFICE.

- (a) Qualification for.
 (a 1) In relation to residence, p. 681.
 (b) Election to.
 (b 1) Time for,—how regulated, p. 681.
 (b 2) Elective assembly, constituents of, p. 682.
 (b 3) Of convening the electors, p. 682.
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 (b 5) Of swearing in, p. 682.
 (b 6) Title of electors, how impeached, p. 682.
 (c) Duration of,—under a general appointment, p. 682.

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 (e) Of vacating,—by accepting another, p. 682.
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II. OFFICER.

- (a) Privileges of.
 (a 1) Writ of privilege, whether essential to, p. 683.
 (b) Liability of.
 (b 1) For the acts of his companion, p. 683.
 (c) Of a deputy.
 (c 1) Liability of, p. 683.
 (d) Of a certificate by,—of his own mistake, p. 683.
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I. OFFICE.

- (a) Qualification for.
 (a 1) In relation to residence.

Where residence is a part of eligibility to office, it is immaterial for how short a period previous to the election, the party took the house or resided therein, provided the residence was *bona fide*, and not merely colourable. If there is a doubt as to this fact, the court will grant an information in nature of *quo warranto*, that it may be ascertained. *Rex v. Sargent*, 5 T. R. 466; *Rex v. The Duke of Richmond*, 6 T. R. 560.

- (b) Election to.
 (b 1) Time for, how regulated.
 Although, where there is no presiding

officer, the control of the election devolves upon the electors themselves, yet the majority of those present cannot narrow the time which the common law would allow for such election. *Rex v. Commissary of Bishop of Winton*, 7 East, 573.

(b 2) *Elective assembly, constituents of.*

The presence of an officer who forms an integral part of an elective assembly, is necessary during the whole period of the election until complete. *Rex v. Buller*, 8 East, 389; see *Rex v. Gaborian*, 11 East, 77; *Mackell v. Nevins*, Id. 84, n.

(b 3) *Of convening the electors.*

Where the whole body of the electors meet without any previous summons, the election, if unanimous, is valid, unless such summons is required by the charter. *Rex v. Theodorick*, 8 East, 543; see *Mackell v. Nevins*, 11 East, 84, n.

(b 4) *Relative to voters and voting.*

1. An election in which some of the voters had no right to vote is void. *Rex v. Mein*, 4 T. R. 480.

2. Votes given for a candidate, after notice declared of his ineligibility, are considered as thrown away, and the other candidate having ultimately a majority of votes over those then given for his competitor, is duly elected, at least where the notice is given in an early stage of the poll. *Rex v. Hawkins*, 10 East, 211.

3. Where the ineligibility of one of three candidates is not declared until votes have been given in his favour, exceeding those given for one of the others, the votes so given cannot be considered as thrown away, so as to entitle the officer to return the two others as elected. *Rex v. Bridge*, 1 M. & S. 76.

4. An order of restoration of a voter, illegally disfranchised, relates to the original right, and may be given in evidence to shew that his vote at an election ought to have been received; though such election were had prior to the date of the order. *Symmers v. The King*, Cowp. 503.

(b 5) *Of swearing in.*

1. A swearing in, being a mere ministerial act, may be in the presence of the majority, &c. whensoever and howsoever assembled. *Rex v. Courtenay*, 9 East, 246.

2. Where the elected has a present capacity of taking upon himself the execution of his office, the swearing in need not be immediately consequent on the election. *Rex v. Courtenay*, 9 East, 246.

(b 6) *Title of electors, how impeached.*

1. Where the title of electors cannot be impeached, otherwise than through the medium of the elected, it may be done. *Rex v. Mein*, 3 T. R. 596.

2. Where a member, after protesting against the measure propounded, quits the assembly before it is carried, the case is the same as if he had never been present. *Rex v. Courtenay*, 9 East, 246.

(c) *Duration of,—under a general appointment.*

An appointment to an office, without limitation as to time, is usually considered as an appointment for life. But where it would be inconvenient to consider it a permanent one, the rule is different; as where the appointee finds sureties for his duly accounting; here his sureties may die, or he fall into bad circumstances. *Rex v. Guardians of the Poor of St. Nicholas, Rochester*, 4 M. & S. 324.

(d) *Suspension from,—its legal effect.*

Suspension is not equivalent to deprivation; so that during a suspension the office is still full. *Philips v. Bury*, 2 T. R. 351.

(e) *Of vacating,—by accepting another.*

Where two offices are incompatible, the acceptance of the last implies a surrender of and vacates the first, whichever be the superior office of the two. *Milward v. Thatcher*, 2 T. R. 81; *Rex v. Blisset*, Dougl. 398, n.

(f) *Relative to fees and donations.*

(f 1) *Title to, on an usurpation.*

No action lies for the owner of an office against an intruder for gratuitous donations received; *secus*, for known and accustomed fees. *Boyer v. Dodsworth*, 6 T. R. 681.

(g) *On the sale of, and contracts relative thereto.*

1. A promise to pay a premium on the sum which a purchaser (to be procured by the plaintiff) would give for defendant's place of surveyor of baggage in the port of

London, is void under 5 & 6 Edw. VI, c. 16, s. 2. *Stockdale v. Earle*, 2 Wils. 133.

2. Where A, through the intarest of B. was appointed to the office of customer of Carlisle, having previously signed an agreement that his name was made use of in trust for B, and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use; this agreement was holden void,—1. At common law;—2. On statutes 12 Rich. II, c. 2; & 5 & 6 Edw. VI, c. 16. *Garforth v. Fearon*, 1 H. B. 327.

(h) *Of indictment for misconduct in.*

(h 1) *Averment of election to.*

One in the exercise of a public office, though without authority, obliges himself to discharge the duties annexed to it. Therefore an indictment against an officer for a breach of duty, need only state that he exercised the office. *Rex v. Holland*, 5 T. R. 607.

(h 2) *Averment of obligation.*

Where the statute or common law requires a particular act to be done by an officer, it is a sufficient averment in an indictment for neglecting it, that it was his duty to perform it. But where the act of duty is not defined by either, but arises out of special circumstances, those circumstances must be set forth. *Rex v. Holland*, 5 T. R. 607.

II. OFFICER.

(a) *Privileges of.*

(a 1) *Writ of privilege,—whether essential to.*

An officer is entitled to his privileges, though he has not taken out his writ of privilege. *Rex v. Warner*, 8 T. R. 375.

(b) *Liability of.*

(b 1) *For the acts of his companion.*

Whe a duty is thrown upon a body, consisting of several persons, each is individually answerable for a breach of that duty, unless he did all that in him lay to discharge it. *Rex v. Holland*, 5 T. R. 607.

(c) *Of a deputy.*

(c 1) *Liability of.*

For a misfeazance in office, an action

will lie against the deputy, if he is a substantive officer, as well as against the principal. *Rowning v. Goodchild*, 5 Burr. 2721; 3 Wils. 454; 2 Blk. 910.

(d) *Of a certificate by.*

(d 1) *Of his own mistake.*

No officer can certify his own mistake. He must make an affidavit of the fact. *Rex v. Bolton*, 1 Anst. 79.

(e) *Officer of justice.*

(e 1) *When protected,—rule in the case of officers of inferior courts.*

1. The officers of an inferior court executing its process for a cause not within its jurisdiction, are not trespassers. *Rex v. Dancer*, 6 T. R. 245.

2. The officer of the court of admiralty executing its process, is protected, if, upon the face of the proceedings, there does not appear a want of jurisdiction. *Ladbroke v. Crickett*, 2 T. R. 649.

(e 2) *When protected,—under 24 Geo. II, c. 44.*

1. Where a justice of peace having granted a warrant, cannot be liable for acts done by his officer, as under its authority, the officer is not within the protection of 24 Geo. II, c. 44, s. 6, which enjoins a demand of a copy of his warrant, &c. before instituting a suit against him. Therefore, where officers under a magistrate's warrant to distrain a party's goods, for nonpayment of a poor's-rate, broke into his house, and broke the windows, held, that they were trespassers in fact *ab initio*, and therefore suable in trespass, without a demand, &c. *Bell v. Oakley*, 2 M. & S. 259. See Loft 236, 252.

2. The 24 Geo. II, c. 44, s. 6, does not extend to replevin. *Fletcher v. Wilkins*, 2 Smith, 365; 6 East, 283.

3. Churchwardens acting under a magistrate's warrant of distress for a poor's-rate, are within the meaning of the words "other officer," in the stat. 24 Geo. II, c. 44, and consequently entitled to the protection which it affords, when sued in those actions to which the statute extends. *Harper v. Carr*, 7 T. R. 270.

(e 3) *Notice of action against,—form of.*

An addition, describing the attorney as of the place generally, thus, "of Birmingham," is a sufficient description of

his place of abode, under stat. 24 Geo. II, c. 44, s. 1, unless the defendant prove that he could not be found by it. *Osborn v. Gough*, 3 B. & P. 550.

ORDER IN COUNCIL.

- (a) *Legal operation of*, p. 684.
- (b) *Disobedience of,—how punishable*, p. 684.

(a) *Legal operation of.*

An order in council cannot suspend the operation of an act of parliament. *Wilkinson v. Londonsack*, 3 M. & S. 117.

(b) *Disobedience of,—how punishable.*

The disobedience of an order made by the king in council, pursuant to an act of parliament, is a misdemeanour at common law. *Rex v. Harris*, 4 T. R. 202.

ORIGINAL WRIT.

- (a) *Want of, how supplied, and defects in, how amended*, p. 684.
- (b) *Of craving oyer thereof*, p. 684.

(a) *Want of, how supplied, and defects in, how amended.*

1. The Master of the Rolls will, on petition, defeat a writ of error brought for a defective original, either by ordering the original to be amended, or, if necessary, granting a new one; and as a preliminary, and in order to retain the bail, the court below will amend the *capias*. *Carr v. Shaw*, 7 T. R. 299.

2. Original writ, if insensible, will be amended. *Cooke v. Milles*, 4 Taunt. 644.

- (b) *Of craving oyer thereof.* (And see ABATEMENT.)

A defendant is not entitled to oyer of the original; and if he crave oyer, the plaintiff may proceed without taking notice of it. *Boats v. Edwards*, Dougl. 227.

OUTLAWRY.

I. GENERAL RULE.

- (a) *Relative to exactness in*, p. 685.

OUTLAWRY.

II. OF SEALING THE WRITS.

- (a) *Whether essential*, p. 685.

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V. RELATIVE TO THE SHERIFF'S RETURN.

- (a) *As well to the writ of proclamation as to the exigent*, p. 685.

VI. OF THE CAPIAS UTLAGATUM.

- (a) *Where filed*, p. 685.

VII. OF THE RECORD OF OUTLAWRY.

- (a) *Averments in,—terms of art, when necessary.*
 - (a 1) *In the description of the year of the reign*, p. 686.
- (b) *Averments in,—of the delivery of the writ of proclamation*, p. 686.
- (c) *Averments in,—of defendant's non-appearance*, p. 686.
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VIII. OF A CO-CONTRACTOR.

- (a) *Its legal effect*, p. 686.

IX. OF A CO-DEPENDANT.

- (a) *Relative to the previous process*, p. 686.
- (b) *Mode of describing*, p. 686.
- (c) *Death of outlaw,—its effect*, p. 686.

X. OF AN ACCESSARY.

- (a) *Jointly with the principal*, p. 686.

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- (a) *On motion*, p. 687.
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- (c) *Its legal effect*, p. 687.

XIII. IN THE EXCHEQUER.

- (a) *Whether allowable*, p. 687.

I. GENERAL RULE.

- (a) *Relative to exactness in*.

In outlawries, scrupulous exactness is required; nor can any thing be supplied by intendment. *Rex v. Almon*, 5 T. R. 302.

II. OF SEALING THE WRITS.

- (a) *Whether essential*.

An outlawry is valid, though it do not appear that the *capias* and *exigent* were under the seal, but only signed by the justices of oyer and terminer. *Rex v. Yandell*, 4 T. R. 521.

III. OF THE FORM OF THE SECOND WRIT OF CAPIAS.

- (a) *In directing the seizure of chattels*.

The st. 25 Edw. III, s. 5, c. 14, which requires that the second *capias* against a party indicted shall require the sheriff to seize *as well his chattels* as his body, does not apply to courts of oyer and terminer and gaol delivery, since the writ is to be returnable in three weeks, when such court will not be sitting. *Rex v. Yandell*, 4 T. R. 521.

IV. OF THE WRIT OF PROCLAMATION.

- (a) *When not necessary*.

In criminal cases no proclamation is necessary to outlawry, after judgment. *Barrington v. Rex*, 3 T. R. 503.

- (b) *Construction of*.

1. If a writ of proclamation require the defendant to render himself (not to the justices, &c. but) to the sheriff, (as it may) so that he might have his body before the justices, &c. at the next sessions of oyer and terminer, it is the duty of the defendant to render himself to the sheriff before the fifth county court; so that an outlawry after that time, and before the next sessions, is valid; since when given, the

defendant had no future day for surrendering. *Rex v. Yandell*, 4 T. R. 5.

2. A writ of proclamation, requiring the sheriff to proclaim the defendant in "open court, in the sheriff's county," means in his county court, and is therefore sufficient. *Rex v. Yandell*, 4 T. R. 521.

- (c) *Return thereon,—conclusiveness of*.

If it appear by the writ of proclamation and return thereon, that an outlawry for felony was pronounced before the day of appearance given to the party, it is erroneous. *Barrington v. Rex*, 3 T. R. 499.

- (d) *The expression in 31 Eliz. c. 3, "in those parts," defined*.

The stat. 31 Eliz. c. 3, requires "one other of the said proclamations to be made at the general quarter sessions of the peace *in those parts* where the party, defendant, at the time of the exigent awarded, shall be dwelling." By "in those parts," is meant county, riding, or division. A writ of proclamation, therefore, requiring proclamation to be made at the general quarter sessions of the peace to be holden for the said sheriff's county, is good. *Rex v. Yandell*, 4 T. R. 521.

V. RELATIVE TO THE SHERIFF'S RETURN.

- (a) *As well to the writ of proclamation as to the exigent*.

1. The sheriff's return to a writ of proclamation, stating that he had proclaimed the defendant at the church door of the parish of Y, in which the writ states that he is inhabiting, is sufficient, though it do not add "where he is inhabiting." *Rex v. Yandell*, 4 T. R. 521.

2. The sheriff, in his return to the writ of proclamation, need not state that the defendant did not appear, though he must in that to the writ of exigent. *Rex v. Yandell*, 4 T. R. 521.

VI. OF THE CAPIAS UTLAGATUM.

- (a) *Where filed*.

In K. B. the writ of *capias utlagatum*, and the sheriff's return to it, ought to be filed in the office of the clerk of the exigents and outlawries; and not in the treasury chamber. *Reynolds v. Adams*, 3 T. R. 578.

VII. OF THE RECORD OF OUTLAWRY.

(a) *Averments in,—terms of art when necessary.*

(a 1) *In the description of the year of the reign.*

In a record of outlawry, it is necessary to state the year of the king's reign in which every transaction happened, though in other records it is not; hence, an outlawry was reversed, because, in the sheriff's return to the exigent, the year of the fourth exaction was not stated. *Rex v. Almon*, 5 T. R. 202.

(b) *Averments in,—of the delivery of the writ of proclamation.*

If it appear by the return of the sheriff, on the record of outlawry, that the writ of proclamation was delivered to him three lunar months before its return, it is sufficient, though not expressly averred. *Rex v. Yandell*, 4 T. R. 521.

(c) *Averments in,—of defendant's non-appearance.*

The record of an outlawry need not allege that the defendant did not come in before the exigent was awarded. *Rex v. Yandell*, 4 T. R. 521.

(d) *Averments in,—positive or not.*

An averment, even in a record of outlawry, that the sheriff was commanded,—to take the defendant,—to exact him,—or otherwise, is a sufficient averment that a writ—of *capias*—of exigent,—and so forth, was issued against him. *Rex v. Perry*, 6 T. R. 573.

(e) *Subscription of coroners to.*

The names of the coroners by whom the outlawry is pronounced, need not be subscribed to the outlawry; since all that is requisite is, that it appear by whom the outlawry was pronounced, and that they had authority so to do. *Rex v. Yandell*, 4 T. R. 521.

(f) *Construction of.*

If in the record of an outlawry it is averred that one sheriff executed the exigent, and another returned it, and the duration of time between the *quinto exactus* and the return does not exceed a year, it will be intended, though not averred, that the sheriff who made the

return was the successor of him who executed the writ. *Rex v. Perry*, 6 T. R. 573.

VIII. OF A CO-CONTRACTOR.

(a) *Its legal effect.*

Notwithstanding the outlawry of one of two contractors sued jointly, the action remains joint, so that the other may insist on any defence which he might have made, had the outlaw defended. *Gordon v. Austin*, 4 T. R. 611.

IX. OF A CO-DEFENDANT.

(a) *Relative to the previous process.*

A declaration in a joint action against two of whom one has been outlawed, will be set aside, unless the process issued against each be referrible to and connected with the same original. *Haigh v. Conway*, 15 East, 1.

(b) *Mode of describing.*

1. The rule, that if a man be outlawed at the suit of another, all men shall have advantage of this personal disability, only applies to the case where he is plaintiff; a declaration, therefore, against one sued with another who has been outlawed, stating that fact, but not adding that the outlawry was in this suit, is insufficient. *Saunderson v. Hudson*, 3 East, 144.

a. In declaring against one defendant upon a contract jointly with another defendant who is outlawed, it is not necessary to aver the outlawry with a *prout patet per recordum*, if it appear to be in the same suit. *M'Michael v. Johnson*, 3 Smith, 56; 7 East, 50.

(c) *Death of outlaw, its effect.*

Where, after outlawry of one of two joint defendants, and before final judgment, the other dies, the right survives against the outlaw, and against him alone. *Fort v. Oliver*, 1 M. & S. 242.

X. OF AN ACCESSARY.

(a) *Jointly with the principal.*

The stat. of Westm. c. 14, (3 Edw. I, c. 14,) enacts, that no accessory shall be outlawed until he that is appealed (which is held to mean indicted as well) of the deed be attainted; and his exigent shall remain until the principal is attainted by outlawry or otherwise. Since an indictment against several is in law a separate

indictment against each (unless where it was essential that they should have joined to make the offence), an outlawry of the principal and accessory (indicted together) on an exigent against both, is erroneous as to the accessory alone. *Res v. Yandell*, 4 T. R. 521.

XI. OF A PARTY ABROAD.

1. It is sufficient to reverse an outlawry, that the party was abroad at the time of exigent proclaimed. *Serocold v. Hampsey*, 12 East, 624, n.

2. If outlawry be obtained while the defendant is beyond sea, it is error, though he went abroad to avoid process. *Hesse v. Wood*, 4 Taunt. 691.

XII. REVERSAL OF.

(a) On motion.

The court of Common Pleas will reverse an outlawry on motion. *Beauchamp v. Tomkins*, 3 Taunt. 141.

(b) Evidence relative to.

1. On a writ of error to reverse an outlawry, on the ground that the outlaw, before and at the time of suing out the writ of exigent, and from thence until the time of pronouncing the outlawry, was in parts beyond the seas; the plaintiff in error having proved the previous proceedings in the outlawry, and that the outlaw, at the time of suing out the exigent, was abroad, and died abroad, but without fixing the time of his death. Held, that it was not necessary to prove the time when the judgment was pronounced. *Richardson v. Robertson*, 1 Mars. 58; 5 Taunt. 309.

2. When you come to reverse an outlawry, you must have the record in court. *Lofft*, 348.

(c) Its legal effect.

After an outlawry has been reversed, the case is the same as if it had never been; inasmuch that all proceedings in the interim between outlawry and reversal, upon the same footing as if no outlawry had been pronounced, are valid. *The President, &c. of St. John's College, Oxford, v. Murrell*, 7 T. R. 259.

XIII. IN THE EXCHEQUER.

(a) Whether allowable.

A plaintiff cannot proceed to outlawry

in the Exchequer, the court having no process on which to found such a proceeding. *Horton v. Peake*, 1 Price, 309.

OXFORD, UNIVERSITY OF.

I. PRIVILEGES OF ITS MEMBERS.

(a) To be sued in its court.

(a 1) *Who entitled to*, p. 687.

II. CLAIM OF CONUSANCE ON BEHALF OF.

(a) *By whom made*, p. 687.

(b) *Affidavit in support of*, p. 687.

I. PRIVILEGES OF ITS MEMBERS.

(a) To be sued in its court.

(a 1) *Who entitled to*.

1. A claim of conusance was refused to the University of Oxford, the party, though a member, not being resident at Oxford. *Hayes v. Long*, 2 Wils. 310.

2. A college barber at Oxford, though he resides in the city out of the college, is entitled to the privileges of the university. *Res v. Routledge*, Dougl. 531.

II. CLAIM OF CONUSANCE ON BEHALF OF.

(a) By whom made.

Conusance on behalf of the university may be claimed by the vice-chancellor of Oxford, during a vacancy in the office of chancellor. *Williams v. Brickenden*, 11 East, 543.

(b) Affidavit in support of.

An affidavit in support of a claim of conusance by the University of Oxford, in respect of one alleged to be now a common servant of the university, need not state that he is resident therein, or that he is matriculated. *Thornton v. Ford*, 15 East, 634.

PAPIST.

1. One seized of a real estate by will, bequeaths several pecuniary legacies, and, as to some, directs that they shall be paid to the full, whatever else, debts excepted, falls short; and then proceeds thus:—

"In order to raise money for these payments, my estate of B, must be sold as soon as conveniently may be after my decease; to this end, I do appoint and empower C. and D, whom I make my executors, to sell, let, or set to sale, both my estates of B, and E." Held, that a creditor who was a papist, was entitled to receive his debt out of the money arising by sale of the testatrix's real estate, according to the appointment of her will. *Foone v. Blount*, Cowp. 464.

2. See tit. PEER.

PARLIAMENT.

I. RELATIVE TO THE ELECTION OF MEMBERS TO SERVE IN.

- (a) *Liability of members for the expenses of the hustings*, p. 688.
- (b) *Liability of members for provisions supplied to voters*, p. 688.
- (c) *Of petitions against the election of*.
 - (c 1) *Costs of*, p. 688.
- (d) *Of the returning officer*.
 - (d 1) *Liability of, for refusing a vote*, p. 689.
- (e) *Of perjury at*.
 - (e 1) *Punishment of*, p. 689.

II. OF THE HOUSE OF LORDS.

- (a) *Of their authority to commit for a breach of privilege*, p. 689.

III. OF THE HOUSE OF COMMONS.

- (a) *Of their authority to commit for a breach of privilege*, p. 689.
- (b) *Of the speaker's warrant*.
 - (b 1) *Mode of executing*, p. 689.
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- (c) *Of the discharging by habeas corpus, from a commitment by*, p. 689.
- (d) *Of the members of*.
 - (d 1) *Relative to civil proceedings against*, p. 689.

I. RELATIVE TO THE ELECTION OF MEMBERS TO SERVE IN.

(a) *Liability of members for the expenses of the hustings*.

1. The 51st Geo. III, c. 126, imposes a duty upon the returning officer of providing a convenient booth or place for holding the election of members of parliament; and it directs that this shall be done at the expense of the *candidate*. A person is nominated and elected by a city as their representative, without any knowledge or concurrence, or interference on his part. He takes his seat in parliament. Held, that he was not a "candidate" within the meaning of the statute, and therefore not liable for the hustings. Candidate means a volunteer. *Morris v. Sir Francis Burdett*, 2 M. & S. 212.

2. Under stat. 51 Geo. III, c. 126, election candidates for Westminster are only liable each for a moiety of the expense of the hustings. *Morris v. Lord Cochrane*, 1 M. & S. 283.

(b) *Liability of members for provisions supplied to voters*.

No action lies by an inn-keeper against a candidate for provisions supplied to voters, whether resident or not, after the taste of the writ. *Ribbans v. Cricket*, 1 B. & P. 264; *Lofthouse v. Wharton*, 1 Camp. 550, n.

(c) *Of petitions against the election of*. (c 1) *Costs of*.

1. The power of directing the costs of a vexatious petition to be taxed under 28 Geo. III, c. 52, and granting a certificate thereon, is not confined to the then speaker when the report was made. *Strachey v. Turley*, 11 East, 194.

2. The speaker may grant a new certificate for costs, under 28 Geo. III, c. 52, if the former certificate or certificates were null. *Strachey v. Turley*, 11 East, 194.

3. Two several petitions were presented against the return of a member for G, which, being referred to a committee, were pronounced each frivolous. Held, that the costs could not be taxed jointly under 28 Geo. III, c. 52. *Strachey v. Turley*, 3 Smith, 560; 7 East, 507.

4. It is a rule, that the enacting clause of an act of parliament, shall not be restrained by the preamble. Thus: three

several statutes previous to 28 Geo. III, c. 52, give costs in certain specified cases of petitions against elections. That statute, in its preamble, recites the three former acts, and that it is expedient that provision should be made for discouraging persons from presenting frivolous or vexatious petitions, &c. "in any of the cases to which the above recited acts relate." In s. 19, it enacts, that whenever the committee shall report, &c. the party or parties "who shall have appeared before the committee in opposition to such petition," shall be entitled to costs. The terms of enactment take in many cases not included in the former acts. Held, that full effect should be given to them, notwithstanding the preamble. *Trueman v. Lambert*, 4 M. & S. 234.

(d) *Of the returning officer.*

(d 1) *Liability of, for refusing a vote.*

The returning officer, at an election to serve in parliament, is not liable to an action for refusing a vote without proof of malice. *Drewe v. Coulton*, 1 East, 563, n.

(e) *Of perjury at.*

(e 1) *Punishment of.*

The punishments imposed by 18 Geo. II, c. 18, are cumulative with those under 5 Eliz. c. 9, s. 6, and 2 Geo. II, c. 25, s. 2. *Rex v. Price*, 6 East, 323.

II. OF THE HOUSE OF LORDS.

(a) *Of their authority to commit for a breach of privilege.*

The House of Lords may fine and imprison for a breach of privilege; thus, for a libel on one of their members. *Rex v. Flower*, 8 T. R. 314.

III. OF THE HOUSE OF COMMONS.

(a) *Of their authority to commit for a breach of privilege.*

The House of Commons have authority to commit in cases of contempt, as for a breach of privilege. *Burdett v. Abbot*, 14 East, 1; 4 Taunt. 401; 5 Dougl. 166.

(b) *Of the Speaker's warrant.*

(b 1) *Mode of executing.*

1. The outer door may be broken open after demand and refusal to arrest under the Speaker's warrant issued for a breach of privilege, pursuant to a resolution of

the House of Commons. *Burdett v. Abbot*, 14 East, 1.

2. As to when the military may be called in aid to execute the Speaker's warrant of arrest, issued pursuant to a resolution of the House of Commons. *Burdett v. Colman*, 14 East, 163.

(b 2) *Justification under.*

In justifying a commitment for a breach of privilege, under the Speaker's warrant, pursuant to a resolution of the House of Commons, the facts upon which the resolution professes to proceed need not be averred. *Burdett v. Abbot*, 14 East, 1.

(c) *Of the discharging by habeas corpus, from a commitment by.*

A member of the House of Commons committed for a breach of privilege, cannot be discharged on a *habeas corpus* during the session. *Brass Crosby's case*, 2 Blk. 754; 3 Wils. 188.

(d) *Of the members of.*

(d 1) *Relative to civil proceedings against.*

1. A member of parliament in the King's Bench prison, though he cannot be charged in custody with a bailable action, may be sued as a common person in custody of the marshal. *Jackson v. Mackreth*, 5 T. R. 361.

2. An attachment does not lie against a member of parliament for non-performance of an award. *Catmur v. Sir E. Knatchbull*, 7 T. R. 448.

3. If a member of parliament be held to special bail, and it be moved to discharge him on a common appearance; the court can take no evidence of his being a member but the return of the writ. *Fenwick v. Fenwick*, 2 Blk. 788.

PARTITION.

I. WHAT LANDS ARE EXCLUDED FROM THE STATUTES OF.

(a) *Customary and tenant-right estates*, p. 690.

II. PROCEEDINGS IN.

(a) *In relation to st. 8 & 9 W. III*, p. 690.

(b) *Amendment of proceedings in*, p. 690.

PARTITION.

I. WHAT LANDS ARE EXCLUDED FROM THE STATUTES OF.

(a) *Customary and tenant-right estates.*

The customary and tenant-right estates peculiar to the North of England are not within the statutes of partition. *Burrell v. Dodd*, 3 B. & P. 378.

II. PROCEEDINGS IN.

(a) *In relation to st. 8 & 9 W. III.*

The provisions in s. 1, of stat. 8 & 9 W. III, c. 31, do not apply where the tenant appears. *Dyer v. Bullock*, 1 B. & P. 344.

(b) *Amendment of proceedings in.*

Declaration on a writ of partition, and the sheriff's return, amended by striking out an erroneous description of the *quality* of the estates conveyed to the different parties. *Baker v. Daniel*, 1 Mars. 537; 6 Taunt. 193.

PARTNERS.

I. WHO ARE CONSIDERED AS.

(a) *In relation to third persons,*
p. 691.

II. WHO ARE NOT CONSIDERED AS.

(a) *In relation to third persons,*
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III. RELATIVE TO PARTNERSHIP CONTRACTS.

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IV. RELATIVE TO PARTNERSHIP PROPERTY.

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PARTNERS.

VI. ON THE AUTHORITY OF ONE PARTNER TO BIND THE FIRM.

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VII. ON THE RESPONSIBILITY OF PARTNERS FOR EACH OTHER.

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VIII. LIABILITY OF PARTNERS ON NEGOTIABLE SECURITIES.

(a) *General rule*, p. 693.(b) *In a particular instance*, p. 693.

IX. LIABILITY OF A CO-PARTNER FROM A SUBSEQUENT ADOPTION, p. 693.

X. OF THE AVOIDANCE OF A FRAUDULENT CONTRACT MADE BY A CO-PARTNER.

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XI. OF SUITS BY.

(a) *Joinder in.*(a1) *In actions of slander*,
p. 694.(a2) *Where the co-partner has no interest*, p. 694.

XII. OF SUITS AGAINST.

(a) *Joint, or several.*(a1) *In an action to rescind a fraudulent sale by one*,
p. 694.(b) *Surviving partner, how sued*,
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XIII. OF A DISTRINGAS AGAINST PARTNERS.

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XIV. OF SUITS BETWEEN PARTNERS.

(a) *For a balance struck*, p. 694.(b) *For a collateral sum advanced*,
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XV. RELATIVE TO A DORMANT PARTNER.

(a) *Joinder of, as co-plaintiff*,
p. 694.

- (b) *Joinder of, as co-defendant,* p. 694.

XVI. IN RELATION TO THE BANKRUPTCY OF A CO-PARTNER.

- (a) *Its legal effect,* p. 695.
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- (a) *In relation to debts,* p. 695.

XVIII. RELATIVE TO SET-OFF.

- (a) *By a surviving partner,* p. 695.
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XIX. ON THE DISSOLUTION OF A PARTNERSHIP.

- (a) *Its legal effect,* p. 695.

XX. MISCELLANEOUS.

- (a) *Right of a partner over property received from his companion for a special purpose,* p. 696.

I. WHO ARE CONSIDERED AS.

- (a) *In relation to third persons.*

1. To make a person liable as a partner, there must either be a contract between him and the ostensible person to share in the profit and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable. *Hoare v. Dawes*, Dougl. 371.

2. An agreement to share profits alone, cannot prevent the consequence of also sharing losses, with respect to creditors. *Hecketh v. Blanabard*, 4 East, 146.

3. If a creditor having been jointly concerned with his debtor, agree with such debtor to be jointly and equally concerned in an adventure abroad, and that such debtor shall purchase and pay for goods for the adventure, and the returns shall be made to the creditor in liquidation of his debt; and in consequence of such agreement the debtor purchase goods for

such adventure, it is a partnership agreement, and both debtor and creditor are liable to the vendors. *Gouthwaite v. Duckworth*, 12 East, 421.

4. A. and B., ship-agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on tradesman's bills employed by them in repairing the ships consigned to them, &c. It was, however, expressly stipulated between A. and B., that they were not to be accountable for each other's losses. Held, that although with respect to each other they were not to be considered as partners under this agreement, yet they had made themselves such with regard to all persons with whom either contracted as a ship agent. *Waugh v. Carver*, 2 H. B. 235.

II. WHO ARE NOT CONSIDERED AS.

- (a) *In relation to third persons.*

1. A. B. and C. agreed that as much oil as could be procured in A.'s name only should be purchased, and they take aliquot shares of it; the oil was bought accordingly, and B. and C. were held not liable to the seller as partners with A. since it did not appear that the parties were jointly to resell the goods. *Coope v. Eyre*, 1 H. Bl. 37.

2. A. B. and C. agreed to join in a mercantile adventure to Y. They were each to purchase separately and to pay for separately goods which were to be shipped for Y. in the same vessel, and they were to share in the profits, if any, and the loss, if any, on the whole outfit, in proportion to the value of the goods each brought in. Held, not partners, and therefore not liable each on the other's purchase. *Saville v. Robertson*, 4 T. R. 720.

3. If one, purchasing goods for exportation, permits another to become partner in the adventure, the second does not thereby become liable to the vendor for the price of the goods. *Young v. Hunter*, 4 Taunt. 582.

4. Joint proprietors of a stage coach by agreement, made known, *comme semble*, to the public, horse separately the several stages of the road. Held, that each was liable, and not the others, for goods furnished for the use of his horses. *Barton v. Hanson*, 2 Taunt. 49.

(b) *Inter se.*

1. Money lent to a trader by a partner who retires from business, at legal interest, with an additional annuity, for a certain term of years, is not a continuance of the partnership. *Grace v. Smith*, 2 Blk. 998.

2. If a person make himself responsible to the vendor for a purchase, upon an agreement with the purchaser that if any profit arise from the sale, he shall have one half for his trouble; this does not constitute a partnership between the parties. *Hesketh v. Blanchard*, 4 East, 144.

3. An agent paid out of the profits of an adventure, is not therefore a partner in the goods. *Meyer v. Sharpe*, 5 Taunt. 74.

4. The consignment of a bag of dollars to A. with directions to pay over a certain number to B., creates no joint tenancy between them. *Jackson v. Anderson*, 4 Taunt. 24.

III. RELATIVE TO PARTNERSHIP CONTRACTS.

(a) *What are considered as.*

A bond is given to one of several partners as a security for money to be advanced by the firm. Held, that the money advanced might be set-off in taking the general account. Note, the obligor had become bankrupt. *Quære*, if the bond was not considered as a collateral security only. *Crope v. Smith*, 1 M. & S. 545.

(b) *Construction of.*

A covenant in a deed of partnership, in case of dissolution, to refer all matters relating thereto to arbitration, does not include the question whether the consideration given by one partner to the other on entering into partnership, should be refunded. *Tattersall v. Groote*, 2 B. & P. 131.

(c) *Evidence of.*

On the question, whether articles were ordered by the firm, acts subsequent to the delivery are admissible evidence against the firm. *Saville v. Robertson*, 4 T. R. 720.

IV. RELATIVE TO PARTNERSHIP PROPERTY.

(a) *Distringas against.*

Where the partner in England refuses to appear for those abroad, the court will not relieve against a distress to compel appearance, though the partnership pro-

perty taken was paid for with his own funds. *Morley v. Stromborn*, 3 B. & P. 254.

(b) *Fi. fa. against.*

1. If on an execution against one of two partners, the partnership effects are taken and sold, the court will order the sheriff to pay over to the other a share of the produce, proportioned to his share in the partnership effects, to be ascertained by the master. *Eddie v. Davidson*, Dougl. 650.

2. If a *fi. fa.* issue against one of several partners, the court will not, upon the application of partnership creditors, either refer it to the officer to ascertain the interest of the defendant in the property seized, or (c. s.) give time to the sheriff to make his return, so as to enable them to obtain an account in equity. The proper line for the sheriff to pursue, is to put some person in possession as vendee, and to leave him and the parties interested, to contest the matters in equity. *Parker v. Pistor*, 3 B. & P. 288.

(c) *Extent against.*

1. Upon an extent against one partner, the crown can only take the separate interest of the partner, and that liable to the partnership debts. *Rex v. Sanderson*, Wightw. 60.

2. The court will not grant an *amoveas manus* to remove the King's hands from partnership property seized under an extent against one of the firm, in the first instance. The course is, to apply for a reference to the deputy remembrancer, and that he may report an account of the joint and separate property, when an *amoveas manus* may be obtained by consent, on giving security. *Rex v. Rock*, 2 Price, 198.

V. OF THEIR INDIVIDUALITY.

(a) *In relation to the disposition of property.*

The indorsement of a bill or note, by one of several partners, in the partnership name, though without the consent or knowledge and in fraud of the others, will be binding on the partnership as between them and an innocent holder. *Swan v. Steele*, 3 Smith, 199; 7 East, 210.

(b) *In relation to the satisfaction of demands.*

1. A debt due to two jointly, may be

discharged by one alone. *Perry v. Jackson*, 4 T. R. 519.

2. Satisfaction of a bill or note as to one of several partners, is a satisfaction as to all; and consequently, where a person is a partner in two firms, a bill or note which is satisfied as to one firm, is satisfied as to both: and this, though the one common partner be in fact ignorant of such bills or notes having been so satisfied. *Jacaud v. French*, 12 East, 317.

(c) *In relation to contracts made abroad.*

The act of one partner, as such, is that of the firm; if, therefore, a contract be concluded in foreign parts, by one partner, the remaining partners being resident in England, so far as the interests of this country are concerned, it is considered as made in England. *Biggs v. Lawrence*, 3 T. R. 454.

VI. ON THE AUTHORITY OF ONE PARTNER TO BIND THE FIRM.

(a) *By deed.*

The implied authority of one partner to bind the firm, is confined to cases of simple contracts. He cannot bind it by deed, that privilege not being usually given by partners to one another. *Harrison v. Jackson*, 7 T. R. 207; *Thomason v. Frere*, 10 East, 418.

(b) *How invalidated.*

(b 1) *By notice.*

Where one partner has given due notice that he will not be bound by his companion's engagements, he is safe. *Lord Galloway v. Mathew*, 10 East, 264.

(b 2) *By the fraud or negligence of the creditor.*

1. One partner cannot bind the firm, if the creditor, when he trusted him, knew that he was acting without authority. *Shireff v. Wilks*, 1 East, 48; *Hope v. Cust*, 1d. 52.

2. If when the creditor trusted the partner, he had reason to suspect that he was acting without authority, the firm is not answerable. *Lord Galloway v. Mathew*, 10 East, 264.

3. If a separate creditor of a member of a firm, receive in payment from his debtor an accepted bill, drawn eighteen days before its delivery to the creditor, and payable forty days after date, for a sum exceeding the debt, and it does not appear that the creditor knew that the bill was

indorsed by his debtor in the partnership firm, or that such payment was unknown to, or unauthorized by, the other partner, and where evidence to this effect might be adduced, the creditor is entitled to recover payment from the acceptor. *Ridley v. Taylor*, 13 East, 175.

4. A private agreement for a consideration, moving to himself, by one of several carriers in partnership, to carry a customer's goods free, will not bind the firm, who may, therefore, insist upon a non-compliance with the common notice, in defence of an action for negligence. *Bignold v. Waterhouse*, 1 M. & S. 255.

VII. ON THE RESPONSIBILITY OF PARTNERS FOR EACH OTHER.

(a) *On the receipt of money.*

If two are partners as attornies and conveyancers, and one receive money to be laid out on mortgage, the other is liable for the amount, though his partner give a separate receipt for it. *Willett v. Chambers*, Cowp. 814.

VIII. LIABILITIES OF PARTNERS ON NEGOTIABLE SECURITIES.

(a) *General rule.*

If a partnership are not bound on the face of a bill or note, evidence to oblige them by it, as proof that the demand for which it was given was due from all, will not be admitted. *Emly v. Lye*, 15 East, 7; *Denton v. Rodie*, 3 Camp. 493.

(b) *In a particular instance.*

If a bill drawn by one member of a firm, be remitted to their agent, who is in the habit of receiving bills from his employers, some drawn in the name of the firm, and some by the separate members of the firm, and the bill so remitted be taken by the agent to a banker's, who discounts it, upon the supposition that it is drawn on the partnership account, and the proceeds of the bill are remitted by the agent to the partnership account, and the discount allowed to him in his account with the partnership; an action cannot be maintained by the banker against the firm, either upon the bill or upon the general *assumpsit*. *Emly v. Lye*, 15 East, 7.

IX. LIABILITY OF A CO-PARTNER FROM A SUBSEQUENT ADOPTION.

A partner, not originally liable, cannot

be charged by afterwards acknowledging himself responsible, or accepting bills drawn on the firm for the credit. *Saville v. Robertson*, 4 T. R. 720.

X. OF THE AVOIDANCE OF A FRAUDULENT CONTRACT MADE BY A CO-PARTNER.

(a) *By the contracting party.*

Where one of two partners sells partnership property, without his companion's authority, and receives the price, the purchaser may, on discovering the fraud, sue the vendor for money had and received. *Hudson v. Robinson*, 4 M. & S. 475.

XI. OF SUITS BY.

(a) *Joinder in.*

(a 1) *In actions of slander.*

Partners should join in an action for slander in the way of their trade. *Cook v. Batchellor*, 3 B. & P. 150.

(a 2) *Where the co-partner has no interest.*

Where a banking trade was carried on in name of father and son, held, that the father, by proving that the son had no property in the banking fund, might sue alone for money over-drawn by a customer; but not otherwise. *Teed v. Elworthy*, 14 East, 210.

XII. OF SUITS AGAINST.

(a) *Joint, or several.*

(a 1) *In an action to rescind a fraudulent sale by one.*

One of two partners, without his companion's authority, sells partnership property, draws a bill upon the purchaser for the price, in name of the firm, and receives payment when due, which he applies to his own use. The property is not delivered to the purchaser, who, therefore, becomes entitled to recover back his money. Held, that he might recover it against the partner receiving it alone, without joining his companion. *Hudson v. Robinson*, 4 M. & S. 475.

(b) *Surviving partner, how sued.*

A surviving partner, defendant, must be sued as such, or the plaintiff will be nonsuited. *Spalding v. Mure*, 6 T. R. 363. *Bovill v. Wood*, 2 M. & S. 25.

XIII. OF A DISTINGUISH AGAINST PARTNERS. (See PROCESS.)

(a) *Separate property, whether amenable to.*

The separate property of one partner who appears, is not distrainable to compel an appearance by the other. *Goldsmith v. Levy*, 4 Taunt. 299.

XIV. OF SUITS BETWEEN PARTNERS.

(a) *For a balance struck.*

If on striking a balance, a sum be found due from one partner to the other, the latter may sue the former. *Smith v. Barrow*, 2 T. R. 478.

(b) *For a collateral sum advanced.*

One partner may sue the other for money received to his separate use, since there is no community of interest therein. *Smith v. Barrow*, 2 T. R. 476.

(c) *On agreements between.*

1. An action may be maintained by one partner against another, for the non-performance of an agreement as to the capital to be advanced for the formation of the partnership. *Venning v. Leckie*, 13 East, 7.

2. If two persons agree to share in profit or loss upon goods bought by one of them, upon their joint account, an action may be maintained by one against the other, for the payment of his share. *Venning v. Leckie*, 13 East, 7.

XV. RELATIVE TO A DORMANT PARTNER.

(a) *Joinder of, as co-plaintiff.*

Where a co-partner contracts avowedly in his individual capacity, though tacitly for his companions also, they cannot be joined as co-plaintiffs for non-performance of the contract. *Lucas v. De la Cour*, 1 M. & S. 249; *Lloyd v. Archbuckle*, 2 Taunt. 324; *Mannan v. Gillett*, Id. 325, n.

(b) *Joinder of, as co-defendant.*

A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action. *Dubois v. Lubert*, 1 Mars. 246; 5 Taunt. 609; denied by Lord Ellenborough.

XVI. IN RELATION TO THE BANKRUPTCY OF A CO-PARTNER.

(a) *Its legal effect.*

1. If one of two partners become bankrupt, the solvent partner may, for valuable consideration, and without fraud, dispose of the partnership effects. *For v. Hanbury*, Cowp. 445.

2. If the right to transfer a bill or note be in several partners, and some of them become bankrupt, and afterwards indorse it, such indorsement, though made to a creditor of the partnership, will confer no title. *Thomson v. Frece*, 10 East, 418.

3. One of three partners in a ship and cargo, the cost and outfit of which was 4,568 *l.* pays only 410 *l.* in part of his third share, and gives his notes for the remainder; but before they become due is declared a bankrupt. The other partners cannot, by voluntarily discharging the notes, stand in his place for any share of the profits. But the assignees are entitled to a full third, both of the profits of the adventure, and of the value of the ship. *Smith v. De Silva*, Cowp. 409.

(b) *Proof of creditor under the bankruptcy, —its legal effect.*

A creditor may sue the solvent partner, notwithstanding proof under the bankrupt partner's commission. *Heath v. Hall*, 4 Taunt. 326.

(c) *Rights of the solvent partner on liquidating the debts.*

1. The debt due from two bankrupt partners to a third, who has been compelled to pay the sum owing from the partnership, is joint. *Wright v. Hunter*, 1 East, 20.

2. A, B, and C. having dissolved partnership without due notice, C. drew, without authority, bills in the partnership firm, in favour of D, ignorant of the dissolution, who sued the firm on the bills. C. having pleaded his bankruptcy, D. entered a *note prosequi* as to him, and had judgment against A. and B, which was satisfied by money lent on their joint account; and A. and B. were allowed to sue C. jointly for the money paid. *Osborne v. Harper*, 5 East, 225.

(d) *On the joinder of demands in a suit against the solvent partner.*

Counts on the promise of the defendant

and another, who has since become a bankrupt, and obtained his certificate, may be joined with counts on promises of the defendant alone. *Hawkins v. Ramsbottom*, 6 Taunt. 179.

XVII. ON SURVIVORSHIP BETWEEN.

(a) *In relation to debts.*

On the death of one partner, the legal right to money due to the partnership wholly survives to the other. If, therefore, it be paid over by the debtor to a third person, the surviving partner may sue the payee for money had and received, without declaring as survivor. *Smith v. Barrow*, 2 T. R. 476.

XVIII. RELATIVE TO SET-OFF:

(a) *By a surviving partner.*

A defendant may set off a debt due to him as surviving partner, against a demand in his own right. *Slipper v. Stidstone*, 5 T. R. 493.

(b) *Against a surviving partner.*

Since a debt due from the plaintiff as surviving partner, is due from himself alone, it may be set off against a demand in his sole right. *French v. Andrade*, 6 T. R. 582.

XIX. ON THE DISSOLUTION OF A PARTNERSHIP.

(a) *Its legal effect.*

1. After the dissolution of a partnership by agreement, one of the persons who composed the firm cannot put the partnership name on any negotiable security, notwithstanding such partner may have had authority to settle the partnership affairs. Nor can any equity arise against them out of the transaction. *Kilgour v. Finlyson*, 1 H. B. 155.

2. Notwithstanding a dissolution of partnership, the authority of each partner to bind the firm by his admissions, in matters which originated during the partnership, is the same as before. *Wood v. Braddick*, 1 Taunt. 104.

3. On a dissolution of partnership between A. and B, an assignment of the effects to A, and the taking upon himself payment of the debts, does not discharge B's liability for money formerly held by A. as trustee for C, and applied by him, with B's consent, in the partnership trade. *Smith v. Jameson*, 5 T. R. 601.

XX. MISCELLANEOUS.

- (a) *Right of a partner over property received from his companion for a special purpose.*

One of several partners in a contract, receiving goods from another partner, for the purpose of performing the contract, cannot pledge them to pay a debt from that other to himself. *Snaith v. Burridge*, 4 Taunt. 684.

PARTY-WALL.

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- (a) *When requisite*, p. 696.

II. ON THE OWNERSHIP IN.

- (a) *Quality of*, p. 696.

III. ON THE LIABILITY FOR THE EXPENSES OF.

- (a) *Under an express agreement*, p. 696.
- (b) *Relative to the owner of the improved rent.*
- (b 1) *Who considered as,—general rules*, p. 696.
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IV. ON THE ACTION FOR THE EXPENSES OF.

- (a) *Preliminary steps*, p. 697.

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VI. ON RIGHTS AND OBLIGATIONS RELATIVE TO, AS BETWEEN LANDLORD AND TENANT.

- (a) *Rights of tenant to reimbursement*, p. 697.
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VII. MISCELLANEOUS RIGHTS CONNECTED WITH.

- (a) *In relation to window lights*, p. 697.

I. NOTICE OF THE BUILDING OF.

- (a) *When requisite.*

The three months notice, under stat. 14 Geo. III, c. 78, s. 38, of the building a party-wall, is only requisite where the party is either ignorant of or adverse to the building, not where he consents. *Peck v. Wood*, 5 T. R. 130.

II. ON THE OWNERSHIP IN.

- (a) *Quality of.*

The separate owners of adjoining tenements are owners in severalty, each half, of the party wall, though built at their joint expense. *Matts v. Hawkins*, 5 Taunt. 20.

III. ON THE LIABILITY FOR THE EXPENSES OF.

- (a) *Under an express agreement.*

A, a builder, proposes to B, the occupier of the adjoining house, to build a party-wall, and states the expense; B. answers, "Very well, I expect to pay what is right and fair;" and the wall is built. Held, that A. was entitled to recover from B. his share of the expense, without reference to the building act, 14 Geo. III, c. 78. *Stuart v. Smith*, 2 Marshall, 435; 7 Taunt. 158. *Seem*, that B. having asked 300 l. for his lease, he was to be considered as owner of the improved rent within that act. *Ibid*.

- (b) *Relative to the owner of the improved rent.*

- (b 1) *Who considered as,—general rules.*

1. By stat. 14 Geo. III, c. 78, s. 41, the expense of a party-wall is thrown upon the owner of the improved rent; which term, "improved rent," stands contradistinguished from some other rent; therefore, where none other exists but that originally reserved, the original lessor is the party liable; as where the lessee assigns, (not under-lets) the premises. *Southall v. Leadbetter*, 3 T. R. 458.

2. In deciding the question who, as owner of the improved rent, is liable to the expenses of a party-wall, the covenants (as for repairs) between the parties,

PARTY-WALL.

cannot be taken into the account. *Sangster v. Birkhead*, 1 B. & P. 303.

(b 2) *Who considered as,—whether owner of the improved value.*

The landlord of a house rack-rented, not the lessee who has improved it, is liable to the expense of a party-wall, since the words of the stat. 14 Geo. III, c. 78, s. 41, "owner of the improved rent," are not to be construed "owner of the improved value." *Beardmore v. Fox*, 8 T. R. 314.

(b 3) *Who considered as,—on an under-lease.*

1. If premises held under a building lease are afterwards let at an improved rent, the owner of that rent, and not the owner of the ground-rent, is liable for the expense of a party-wall, under stat. 14 Geo. III, c. 78, s. 41. *Peck v. Wood*, 5 T. R. 130.

2. Where a house rack-rented is underlet at an advanced rent, the first lessee is liable for the expenses of a party-wall. *Sangster v. Birkhead*, 1 B. & P. 303.

(b 4) *Who considered as,—evidence relative to.*

Neither possession of a house, nor the demise of a house, in consideration of the cost the tenant has incurred in building it, proves that the tenant was, at the time of building it, the owner of the improved rent, to subject him to contribution to a party-wall previously built. *Taylor v. Reed*, 6 Taunt. 249.

IV. ON THE ACTION FOR THE EXPENSES OF.

(a) *Preliminary steps.*

The regulations prescribed by sect. 41 of stat. 14 Geo. III, c. 78, to be observed previous to an action for the expenses of a party-wall, apply as well where the owner himself as a tenant is the occupier of the house liable. *Philp v. Donati*, 2 Taunt. 62.

V. ON THE ACTION FOR PULLING IT DOWN.

(a) *Costs in.*

If in trespass against the owner of a house adjoining to the plaintiff's, in the metropolis, for taking down his party-wall, and building upon it, it appears at

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the trial that the defendant was authorized in what he had done, by the provisions of the Building Act, 14 Geo. III, c. 78, and thereupon the plaintiff be nonsuited, the defendant will be entitled to treble costs. *Collins v. Poney*, 9 East, 322.

VI. ON RIGHTS AND OBLIGATIONS RELATIVE TO, AS BETWEEN LANDLORD AND TENANT.

(a) *Rights of tenant to reimbursement.*

Under the Party-wall Act, a landlord is bound to reimburse his tenant only in respect of money paid to the adjoining owner. *Robinson v. Lewis*, 10 East, 227.

(b) *Obligation of tenant to bear the expense of, from his covenant.*

Under a stipulation in a lease, that "it is the true intent and meaning of these presents, and of the parties hereto, that the landlord shall receive the yearly rent of 60 l. hereby reserved, in net money, without any deduction, defalcation, or allowance out of the same, on any account whatsoever," coupled with a covenant by the tenant, "to bear a reasonable share and proportion of or for and towards supporting, repairing, amending, and cleansing all party-walls belonging, or which hereafter shall belong to the premises;" the tenant, not the landlord, is liable to contribute to a party-wall built during the term. *Barrett v. The Duke of Bedford*, 8 T. R. 602.

VII. MISCELLANEOUS RIGHTS CONNECTED WITH.

(a) *In relation to window-lights.*

A person who has lights in an edifice carried up above a party-wall, not warranted by the Building Act, 14 Geo. III, c. 78, may nevertheless recover against an owner of adjoining land, who contributed to the party-wall, for obstructing the plaintiff's lights. *Titterton v. Conyers*, 5 Taunt. 465.

PATENT.

I. SUBJECTS OF.

(a) *A particular instance*, p. 698.

II. EXTENT OF.

(a) *Whether regulated by the invention*, p. 698.

III. ENTIRETY OF.

- (a) *Where the subject is the making several things by one process*, p. 698.

IV. RELATIVE TO THE SPECIFICATION.

- (a) *General rules*, p. 698.
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- (a) *Action for*.
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VI STATUTE RELATIVE TO.

- (a) 21 *Jac. I*, c. 3, p. 699.

I. SUBJECTS OF.

- (a) *A particular instance*.

A patent was granted to A. B. for a new-invented method of using an old engine in a more beneficial manner than was before known. The specification stated, that the method consisted of certain principles, and described the mode of applying those principles to the purposes of the invention, and an act of parliament, reciting the patent to have been for the making and vending certain engines by him invented, extended to A. B. for a longer term than fourteen years, the privilege of making, constructing and selling the said engines. Held, that the invention was the subject of a patent, and that the patentee's right under the patent and act of parliament was valid. *Hornblower v. Boulton*, 8 T. R. 95. In *Boulton v. Bull*, 2 H. B. 463, the court were divided. See *Lofft*, 395.

II. EXTENT OF.

- (a) *Whether regulated by the invention*.

The patent must not be more extensive than the invention. If, therefore, the invention consist in an addition or improvement only, and the patent be for the whole machine or manufacture, it is void. *Rex v. Else*, 11 East, 109, n.

III. ENTIRETY OF.

- (a) *Where the subject is the making several things by one process*.

If a patent is obtained for making several things by one process, and the process fails in producing any one, the

patent is void. The consideration of the patentee's exclusive right was the producing the several things specified, and the whole of them; now a part of that consideration has failed, and with it his right. *Turner v. Winter*, 1 T. R. 602.

IV. RELATIVE TO THE SPECIFICATION.

- (a) *General rules*.

1. A specification must be given in the clearest and most unequivocal terms of which the subject fairly admits. If there is any unnecessary ambiguity in the specification, so that a man of science could not produce the thing intended without trying experiments, or any thing which tend to mislead the public, as if he makes the article with cheaper materials than those which he has enumerated, although the latter will answer equally well, the patent is void. *Turner v. Winter*, 1 T. R. 602.

2. Where a patent is granted for improvements in a machine,—for which a former patent had been granted, and whereof a specification had been enrolled,—“so as a specification, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed, should be enrolled;” a general specification describing the whole machine is sufficient. *Harmerv. Playne*, 11 East, 101.

3. Where a person obtains a patent for a machine, consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct, in setting out the whole as the invention of the patentee. But, if a combination of a certain number of those parts have previously existed up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements; though the effect produced be different throughout. *Bovill v. Moore*, 2 Marshall, 211.

- (b) *Design of*.

The consideration which a patentee gives for his monopoly, is the benefit which the public are to derive from his invention after his patent is expired; which benefit is secured to them by a specification. *Turner v. Winter*, 1 T. R. 602.

V. RELATIVE TO THE INFRINGEMENT OF.

(a) *Action for.*(a 1) *Evidence in.*

In actions for infringing patents, the plaintiff must shew in what his invention consists, and that he has produced the effect proposed in the manner specified, though for this purpose slight evidence will be sufficient. *Turner v. Winter*, 1 T.R. 606, 607.

VI. STATUTE RELATIVE TO.

(a) 21 Jac. I, c. 3.

Patentees for new inventions are left by 21 Jac. I, c. 3, to the common law, and the remedies which follow the nature of their right. *Millar v. Taylor*, 4 Burr. 1323.

PAUPER.

I. CIVIL SUITS IN FORM OF.

(a) *Of the rights of a plaintiff.*(a 1) *To costs*, p. 699.(a 2) *To issue money*, 699.(b) *Of the liabilities of a plaintiff.*(b 1) *To costs*, p. 699.(b 2) *To be dispaupered*, p. 699.

II. CRIMINAL SUITS IN FORM OF.

(a) *Of prosecuting in formd pauperis*, p. 699.

III. CONVICTION OF, p. 699.

I. CIVIL.

(a) *Of the rights of a plaintiff.*(a 1) *To costs.*

A pauper is entitled to costs, though he pays none. *Rice v. Brown*, 1 B. & P. 39.

(a 2) *To issue money.*

A plaintiff, suing in *formd pauperis*, is not entitled to issue money. *Codron v. Hayman*, 5 T.R. 509.

(b) *Of the liabilities of a plaintiff.*(b 1) *To costs.*

Where a party suing in *formd pauperis*, misbehaves himself, he will be dispaupered, and thence becomes liable for costs. But can in no event be made liable for

the time he sued as such. *Rice v. Brown*, 1 B. & P. 39. See *Blood v. Lee*, 3 Wils. 24.

(b 2) *To be dispaupered.*

If the lessor of the plaintiff sue in *formd pauperis*, he will be dispaupered, in case of vexatious delay; but *semble*, he will not be compelled to pay the defendant's costs. *Doc. d. Leppingwell, v. Trussell*, 6 East, 505; 2 Smith, 676.

II. CRIMINAL.

(a) *Of prosecuting in formd pauperis.*

A prosecutor cannot prosecute in *formd pauperis*, without special cause. *Rex v. Clarke*, 3 Burr. 1308.

III. CONVICTION OF.

In a conviction of a pauper for returning, &c. the fact should appear to have been by confession, oath, or view of the justice himself; and it should appear that he returned without certificate. *Lofft*. 84.

PAWNBROKER.

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II. SALES TO, p. 699.

I. OFFENCES BY,—COGNIZABLE BY A MAGISTRATE.

The taking more interest by a pawnbroker than is allowed by the st. 39 & 40 Geo. III, c. 99, is an offence cognizable, by information, before a magistrate under sect. 26. *Rex v. Beard*, 12 East, 673.

II. SALES TO.

A. buys plate of B, the defendant, and gives him a draft; for which A. gives receipt as for cash. A. pawns the plate to C, the plaintiff, who was a pawnbroker, shewing him the receipt as evidence of his title, on which C. took the goods in pawn. The draft turned out afterwards to be a bad one; for A. had no money with the banker. A. was tried on the statute for procuring, under false pretences, on an indictment preferred by the defendant B. he was convicted, C, the plaintiff, producing the goods. B, the defendant, upon this, took and detained

them; A. brought his action of trover thereupon,—and held, “that he should recover; for that the property was not changed as against the right owner, either at common law, or by the statute of James respecting pawnbrokers.” *Lofft.* 187.

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- (c) *To whose use received.*
 - (c 1) *In a particular instance*, p. 701.
- (d) *Rescission of.* (See CONTRACT, and MONEY HAD AND RECEIVED.)
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III. OF MONEY TO THE SHERIFF, IN LIEU OF BAIL.

(a) *Plaintiff whether entitled to, where the arrest is void*, p. 706.

I. IN DISCHARGE OF DEBTS.

(a) *Before the appointed time.*

The obligee of an annuity bond not forfeited, borrows from the obligor a sum equal in amount to the several succeeding payments, under an agreement that it shall go in liquidation of them. Before any one is due, the obligee becomes bankrupt. Held, 1. That the payments were discharged, upon the principle that a payment before the day is, in legal operation, a payment at the day. 2. That the bankruptcy made no difference, since it was competent to the obligee, when solvent, to make what disposition he pleased of his rights. *Sturdy v. Arnand*, 3 T. R. 599.

(b) *Application of.*

(b1) *General rules.*

1. Though it is a rule, that if a debtor, who owes money on several accounts, do not apply a part payment, when made, to a particular debt, but pay in the money generally, the creditor has a right to apply it to any part of his demand which he pleases; yet there may be a special application made, arising out of the nature of the transaction, though not expressed at the time, in terms, by the party making it. *Newmarch v. Clay*, 14 East, 239.

2. In a case of false representation, where the transactions between the creditor and debtor are continued beyond a period when the person giving such false representation continues to be liable on account of them, but without a settlement of the balance up to that period; and money be afterwards paid generally by the debtor to the creditor, he may apply such payments to the account of the subsequent transactions; and the person, giving the false representation, shall still be liable for the balance due before the period when his liability ceased. *Hutchinson v. Bell*, 1 Taunt. 558.

3. *Vide supra*, 501, VI. (a) pl. 1.

(b2) *In particular instances.*

1. If a vendee pay money to a broker on a general account, having purchased from him goods of different owners, he cannot, upon failure of the broker, apply the whole to one demand, but it must be apportioned amongst the several principals, leaving the vendee liable to each for the surplus. *Favenc v. Bennet*, 11 East, 36.

2. A. covenants with B. to serve him for certain wages for three years, at the end of which time a balance remains due to him from B. A. then enters into a fresh contract, not under seal, to serve B, at increased wages; and at the end of three years more it appears that he has received at different times, sums more than sufficient to cover the balance due on the former contract. Held, that the last-mentioned sums having been paid generally, without specifying on what account, A. had a right to apply them to the satisfaction of the simple contract debt. *Peters v. Anderson*, 1 Mars. 238; 5 Taunt. 596.

3. A, B, and C, enter into partnership as bankers in London, and agree that neither shall engage in any other bank, except for the benefit of the whole. C, however, with the consent of A. and B, enters into the bank of D. and E, at Barton. C. dies, when a balance of 6,633*l.* is due to the London house from advances to the Barton house. The London house continues to make advances to the Barton house, under the firm of C, D, and Co. till the balance in their favour amounts to 11,272*l.* which, however, is afterwards reduced by payments made generally, without any specific appropriation, to 4,304*l.* Held, (1. that C. being a partner in both houses, no legal contract could exist between them in his life-time, and therefore, that no part of the demand which accrued in that time could be recovered either before, or after his death. But, 2.) that the payments by the Barton house to the London house after C.'s death, having been made generally, the latter was entitled to apply them in satisfaction of the debt due at C.'s death, and therefore to recover the money advanced by them since his death. *Bosanquet v. Wray*, 2 Mars. 319; 6 Taunt. 597.

4. *Vide supra*, 501, VI. (a) pl. 2.

(c) *To whose use received.*

(c1) *In a particular instance.*

If the indorsee of a bill of exchange,

who has received a navy bill assigned to to the drawee as a security to him (the indorsee) till the bill of exchange is accepted, deposit such navy bill with the drawee, and the drawee receive the money thereon; he is answerable for the amount in an action for money had and received to the use of the indorsee, though he may have done nothing that amounts to an acceptance of the bill of exchange. *Pierson v. Dunlop*, Cowp. 571.

(d) *Rescission of.* (See CONTRACT, and MONEY HAD AND RECEIVED.)

(d v) *When made for irregular assessments.*

If a creditor, on being called upon by his debtor, a public officer, for assessments irregularly made, desired him to pay and deduct them out of the sum owing to the creditor; the debtor may set them off against the creditor's demand. *Roper v. Bayford*, 3 Taunt. 76.

(d 2) *When made for postage.*

If the post-master demands and receives any thing for the delivery of letters, within the post town, beyond the legal rate of postage, it may be recovered back by action of money had and received. *Barnes v. Foley*, 4 Burr. 2149; 5 Burr. 2711; 1 Blk. 643; 3 Wils. 448.

(d 3) *When made on signing a bankrupt's certificate.*

If a creditor has taken money for signing a bankrupt's certificate, it shall be recoverable back in an action for money had and received. Dougl. 472; *Smith v. Bromley*, Id. 696, n.; *Walker v. Chapman*, Loft. 345.

(d 4) *When made in trust to discharge a bill of exchange.*

If the drawer of a bill gives the payee, from whom he has received the amount, a check to pay over to the then holder in discharge, but who afterwards proves not entitled from having made the bill his own, he may be sued by the drawer for the amount of the check. *Whitfield v. Savage*, 2 B. & P. 277.

II. OF MONEY INTO COURT.

(a) *Whether of course.*

Before plea pleaded, the payment of money into court is of course. After plea

it may be done by obtaining a judge's order. *Griffiths v. Williams*, 1 T. R. 710.

(b) *When allowable or not, in general.*

1. Where a sum of money demanded is certain, or capable of being ascertained by computation, payment into court will be admitted, and the amount struck out of the declaration. *Hallet v. E. I. Company*, 2 Burr. 1120.

2. In an action for general damages, since a tender cannot be pleaded, the defendant cannot pay money into court; not therefore in an action for dilapidations. *Salt v. Salt*, 8 T. R. 47.

(c) *When allowable or not, in particular instances.*

(c 1) *Where an inquiry is set aside, and a new one directed.*

Where an inquisition is set aside, and a fresh inquiry directed; money, with costs up to that time, may be paid into court, and struck out of the declaration, upon the usual terms. *Day v. Edwards*, 1 Taunt. 491.

(c 2) *To abide the issue of adverse claims.*

1. Where a third person claims from the defendant the whole of the plaintiff's demand, the court will stay proceedings on paying it into court. *Secus*, where the claim is of part only. *Macdonald v. Pasley*, 1 B. & P. 161.

2. Where the defendant has received the sum in question by virtue of his public office, for example, as a navy prize agent, and there are other claimants besides the plaintiff, it may be paid into court for the use of those who shall appear entitled. *Edwards v. Minett*, 1 Taunt. 166.

(c 3) *In the case of cross actions.*

A foreigner having obtained judgment in *assumpsit*, and the defendant therein having a cross action upon the case pending against the foreigner for damages accruing out of the same transaction, the court permitted the defendant to pay the debt on the former judgment into court; to abide the event of the suit then pending, but to be paid out immediately after the trial, he going to trial immediately. *Pinto v. Hutchinson*, 1 Smith, 338.

(c 4) *In assumpsit for foreign money.*

In an action on a contract to pay in foreign money, the court will not allow

money to be paid into court, since without the intervention of a jury the value cannot be fixed. *Cuming v. Monro*, 5 T. R. 87.

(c 5) *In assumpsit on a policy.*

The stat. 19 Geo. II, c. 37, s. 7, which enables a defendant to pay money into court in actions on policies of insurance, (and therefore to make a tender before action) is general, and not confined to marine insurances. *Solomon v. Bewicke*, 2 Taunt. 317.

(c 6) *In assumpsit against a carrier.*

Money cannot be paid into court by a carrier sued in *assumpsit* for goods spoiled. *Fail v. Pickford*, 2 B. & P. 234.

(c 7) *In assumpsit for the non-delivery of goods sold.*

Money cannot be paid into court in *assumpsit* for the non-delivery of goods at a certain price. *Strong v. Simpson*, 3 B. & P. 14.

(c 8) *In assumpsit for canal calls.*

Money was paid into court in an action upon the case for canal calls. *The Huddersfield Canal Company v. Buckley*, 7 T. R. 36.

(c 9) *In debt on bond payable by instalments.*

Principal and interest due on a bond payable by instalments, may be paid into court. *Bonafous v. Rybot*, 3 Burr. 1370.

(c 10) *In debt on a bastardy bond.*

Penalty of a bastardy bond paid into court. *Brangwin v. Perrot*, 2 Blk. 1190.

(c 11) *In debt on the game laws.*

Money was allowed to be paid into court in debt for penalties on the game laws. *Stock v. Eagle*, 2 Blk. 1052.

(c 12) *In covenant.*

In general, in covenant, money cannot be paid into court, since the action is usually for uncertain damages; but on a special count for a liquidated sum, such as for non-payment of rent, or of 5*l.* per acre for ploughing up meadow land, it may. *Futwell v. Hall*, 2 Blk. 837.

(c 13) *In case for a false return to a fi. fa.*

The defendant in an action for a false return to a *fi. fa.* cannot pay money into court. *Bowles v. Fuller*, 7 T. R. 335.

(c 14) *On an avowry for rent.*

On an avowry for rent, the plaintiff may pay it into court. *Vernon v. Wynne*, 1 H. B. 24.

(d) *By one of two defendants.*

Where one defendant suffers judgment by default, and a second is outlawed, the third shall not bring money into court. *Kay v. Panchiman*, 2 Blk. 1029.

(e) *Conditions of.*

Where money is paid into court upon the common rule, the court will not discharge that part of it which directs the payment of costs, unless the defendant have been prevented making a legal tender by the fraud or vexatious conduct of the plaintiff. Therefore they refused the application where the defendant had merely pulled out his pocket-book for the purpose of making a tender, six weeks before action brought, and was prevented by the plaintiff walking away;—never having repeated the offer. *Last v. Benton*, 2 Mars. 478.

(f) *Application of.*

1. Where money is paid into court generally, it can only be applied to such demands as are legal. *Ribbans v. Crickett*, 1 B. & P. 265.

2. Where money may be paid into court upon some counts of the declaration, upon others not, a payment generally must be applied to the former only. *Cottrell v. Apsey*, 1 Mars. 581; 6 Taunt. 322.

3. On a declaration stating multifarious demands arising out of one transaction, payment into court of a sum incompetent to meet all the demands, cannot be applied by the plaintiff as evidence of such one of the demands as he may elect. *Ederth v. Bell*, 7 Taunt. 450; 1 Moore, 158.

(g) *Objections to, how taken and waived.*

If money is irregularly paid into court under a rule, as in an action for unliquidated damages, the plaintiff's course is, to move to discharge the rule; for if he takes the money out, he waives the irregularity, so that, to entitle himself to a verdict, the

jury must give damages beyond the sum paid in. *Griffiths v. Williams*, 1 T. R. 710.

(h) *Its legal effect, and evidence of what.*

(h 1) *General rules,—admission of the plaintiff's right.*

The payment of money into court admits,—1. The plaintiff's right to maintain the action:—2. And to recover up to the extent of the sum paid in, but no more. If, therefore, consistently with the defendant's contract, he may have concluded it, and yet owe thereon no more than the sum paid in, the *onus* of proving, in the regular way, that more is due, lies upon the plaintiff. *Cox v. Parry*, 1 T. R. 464.

(h 2) *General rules,—admission of the contract.*

1. The payment of money into court is an admission of the contract stated in the count. *Watkins v. Towers*, 2 T. R. 275.

2. Payment of money into court generally admits the contract as stated in the declaration. *Andrews v. Palsgrave*, 9 East, 325.

3. Payment of money into court generally, admits the existence of a contract in every transaction which may be turned to one by assent of parties. *Bennett v. Francis*, 2 B. & P. 550.

4. The payment of money into court by a defendant sued on a contract, is an act whence a jury may infer that he made the contract, such being the natural inference. The fact that he made it being established, if it necessarily follows, that having made it, he must owe more than the sum paid in, they are warranted in finding that also, unless he shews payment. But, unless that is the inevitable consequence; if it does not follow, that because he made the contract, he therefore owes the money; if a state of things may exist in which he would be liable for the sum paid in, and no more, he is not, by the act of paying in the money, made liable farther. Hence, where an action was brought on a policy on goods to be loaded at a particular port, and the defendant paid money in generally, held, that he might contend that the goods, except as to such portion as the money paid in covered, were not loaded at the specified port, and so that the policy never

attached. *Mellish v. Allnutt*, 2 M. & S. 106.

(h 3) *General rule,—whether a discharge of the debt.*

Payment of money into court in a suit demanding payment, does not discharge the debt; therefore, it may still be pleaded by way of set-off. *Evans v. Prosser*, 3 T. R. 186.

(h 4) *General rule,—in relation to a special verdict.*

Payment of money into court upon a contract, is only evidence from which a jury may infer the fact that the party made the contract; therefore, if they only state the fact of the payment in a special verdict, the court cannot draw the inference. *Mellish v. Allnutt*, 2 M. & S. 106.

(h 5) *In particular instances,—in an action on a bill or note.*

In an action on a bill of exchange against the drawer, payment of money into court, generally, is an admission of his hand-writing. *Gutteridge v. Smith*, 2 H. B. 374.

(h 6) *In particular instances,—in an action on a valued policy.*

Payment of money into court on a valued policy, only admits a loss *pro tanto*. *Rucker v. Palsgrave*, 1 Taunt. 419.

(h 7) *In particular instances,—in an action against a carrier.*

In *assumpsit* by the owner of a trunk of the value of 15*l.* which had been lost by the defendant, a carrier, the declaration stated a general undertaking by the defendant to carry goods safely for hire, and the defendant paid 5*l.* into court. Held, that the defendant could not give in evidence a notice "that he would not be responsible for more than 5*l.* for any property lost, unless the same was booked and paid for according to the value," and that the trunk in question had not been so paid for; because the payment of money into court, upon a count stating a special contract, was an admission of such contract, and narrowed the inquiry to the quantum of damages sustained by the breach thereof. *Yate v. Willan*, 2 East, 128; but see *supra*, 214, V. (b 2).

(h 8) *In particular instances,—miscellaneous.*

If the plaintiff, previous to the trial, has

induced the defendant to believe that the only point to be tried would be a question of fraud, and has suffered him to prepare his evidence for that purpose, the court will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by the payment of money into court. *Muller v. Hartshorne*, 3 B. & P. 556.

(i) *Whether recoverable back.*

Money paid into court by mistake, cannot be recovered back. *Secus*, if paid by fraud. *Vaughan v. Barnes*, 2 B. & P. 392.

(k) *How affected by the subsequent death of the payer.*

Where a defendant deposited money, under a rule of court, to abide the event of an action of tort, and died before trial, the plaintiff was not permitted to take it out. *Dewell v. Moron*, 5 Taunt. 603.

(l) *Relative to costs thereon.*

(1) *General rules.*

1. In the K. B. if the defendant pays money into court, the plaintiff is entitled to costs up to that time, though he afterwards proceeds with the action. *Hartley v. Bateson*, 1 T. R. 629.

2. If the defendant pays money into court, which the plaintiff refuses to accept, and at the trial a juror is withdrawn, the plaintiff cannot claim costs up to the time of paying money into court. *Stodhart v. Johnson*, 3 T. R. 657.

3. The plaintiff is entitled to costs up to the time of payment of money into court, though he proceed to trial and fail, provided he apply before trial, and serve the defendant with notice of an appointment before the master to tax the costs (which he, and not the defendant, must do); after trial, he comes too late. *Stevenson v. Yorke*, 4 T. R. 10, (over-ruling *Griffiths v. Williams*, 1 T. R. 710); *Kabell v. Hudson*, *Id.* 10.

4. In all cases where the plaintiff does not proceed to trial, he is entitled to costs up to the time of paying money into court, even though defendant may have judgment as in case of a nonsuit. *Scamour v. Bridge*, 8 T. R. 408.

5. Where money is paid into court, and there is no trial, the plaintiff is entitled to costs up to that time; though he withdraw the record twice after carrying it down,

and then discontinues. *Lorck v. Wright*, 8 T. R. 486.

6. Where the defendant, having failed from having paid money into court generally, obtains a new trial, and leave to amend the rule for paying, &c. by confining it to particular counts, whereupon the plaintiff elects to accept the money, and not to proceed further, he is entitled to the costs of the whole action. *Andrews v. Palsgrave*, 9 East, 325.

7. Touching the question of costs, judgment as in case of a nonsuit is of the same force as a judgment upon nonsuit; as, therefore, in the latter case, the plaintiff is not entitled to costs up to the time of the payment by the defendant of money into court, neither is he in the former. *Crosby v. Olorenshaw*, 2 M. & S. 335.

8. In C. B. if the defendant pay money into court, the plaintiff will be entitled to costs up to that time at all events, although he should afterwards proceed to trial, and a verdict should be found for the defendant. *Willon v. Place*, 2 B. & P. 56.

9. In C. B. a plaintiff is entitled to costs up to the time of paying in money, notwithstanding he proceeds to trial and fails. *Muller v. Hartshorne*, 3 B. & P. 556.

10. The general rule as to costs where money paid in is not accepted, and the defendant has a verdict, is the same in C. B. as in K. B., namely, that the plaintiff is not entitled to costs up to the time of payment in. *Twemlow v. Brock*, 2 Taunt. 361.

11. A defendant succeeding after payment of money into court, which the plaintiff refuses to accept, is entitled to the costs of the whole action. *Jeffs v. Smith*, 4 Taunt. 196.

12. Where the defendant pays money into court, and the plaintiff proceeds, and suffers the defendant to sign judgment of nonpros against him, he shall not afterwards be entitled to his costs up to the time of paying the money into court. *Postle v. Beckington*, 1 Mars. 510; 6 Taunt. 158.

(12) *Where the payment is confined to part.*

1. Where money is paid into court upon some counts only which the plaintiff takes out, he is only entitled to the costs of those counts. *Baillic v. Cazelet*, 4 T. R. 579.

2. Where the plaintiff accepts money paid into court on one count only, and discontinues, he is not entitled to the costs of the others. *Skerratt v. Vaughan*, 2 Taunt. 266.

(13) *On the consolidation of actions.*

1. Where several insurance causes on the same policy, in each of which the defendants have paid money into court, which the plaintiff has taken out without taxing costs, are consolidated to abide the event of one; if the plaintiff is nonsuited in that one, he is not entitled to costs in the others, up to the time of paying money into court, any more than in the one tried. *Burstall v. Horner*, 7 T. R. 372.

2. Where actions on policies are consolidated, and money is paid into court, which the plaintiff not accepting, the defendant has a verdict, the plaintiff is nevertheless entitled to the costs of the short causes up to the time of payment in. *Twemlow v. Brock*, 2 Taunt. 361.

(14) *In an action on a policy.*

A plaintiff on a policy, taking the premium out of court, does not lose his costs of the special counts, where there is no consolidation rule, though he had failed on the special counts in another action. *Redman v. Woodman*, 5 Taunt. 607.

III. OF MONEY TO THE SHERIFF IN LIEU OF BAIL.

(a) *Plaintiff whether entitled to, where the arrest is void.*

An arrest by a writ in which the defendant is misnamed, is a nullity; he, therefore, and not the plaintiff, is entitled to the money paid to the sheriff to obtain his discharge; nor does he waive the objection by delay. *Cadby v. Parsons*, 5 Taunt. 623.

PEACE, ARTICLES OF.

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II. DURATION OF.

(a) *General rule*, p. 706.

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(a 1) *Subject matter of*, p. 706.

(b) *In answer to.*

(b 1) *Whether allowable*, p. 706.

I. NATURE OF.

(a) *Whether a security or punishment.*

Bail on articles of the peace is not by way of punishment, but as a security for good behaviour. *Rex v. Bowes*, 1 T. R. 700.

II. DURATION OF.

(a) *General rule.*

The term during which security for the peace shall be given, is entirely in the discretion of the court. After it has been given, the court may shorten the period, if they see occasion. But it seems, that without fresh facts, they cannot enlarge it, or require a renewal of the security after it has run out. *Rex v. Bowes*, 1 T. R. 696.

III. AFFIDAVITS RELATIVE TO.

(a) *In support of.*

(a 1) *Subject matter of.*

Facts must be alleged in articles of the peace sufficient to warrant the apprehension of danger. *Lord Vane's case*, 13 East, 172, n.

(b) *In answer to.*

(b 1) *Whether allowable.*

Affidavits in answer to articles of the peace, denying the facts, are inadmissible. *Rex v. Doherty*, 13 East, 171; *Lord Vane's case*, *Ibid*, n.

PEER.

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PEER.

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II. ROMAN CATHOLIC.

- (a) *Privilege of,—of franking*, p. 707.

I. CIVIL PROCEEDINGS AGAINST.

- (a) *Relative to the process.*
- (a 1) *A bill of Middlesex.*

It is irregular to sue a peer by bill of Middlesex, such bill containing a *capias*, which does not lie against a peer; and if he be so sued jointly with others, the proceedings as to him will be set aside on motion, without leaving him to plead his privilege in abatement. *Semble*, if the process describes him as a peer, the affidavit on which the motion is founded need not state that he is one. *Briscoe v. Lord Egremont*, 3 M. & S. 88.

- (a 2) *An original bill.*

Peers may be sued in B. R. by original bill. *Gosling v. Lord Weymouth*, Cowp. 844.

- (b) *Whether liable to an attachment for non-performance of an award.*

A peer cannot be attached for non-performance of an award, though with his consent. *Walker v. The Earl of Grosvenor*, 7 T. R. 171.

- (c) *Objections to, how taken and waived.*
- (c 1) *By motion.*

1. A *latitat* will be set aside where the defendant is styled "a baron," in the *præcipe* filed on issuing the writ. *Couche v. Lord Arundel*, 3 East, 127.

2. If an Irish peer be sued by bill, the court will not set aside the proceedings on motion, but leave him to plead his privilege in abatement. *Davies v. Lord Rendlesham*, 1 Moore, 410. *Vide supra*, (a 1).

- (c 2) *Waiver, by pleading in chief.*

Even admitting that a peer of parliament cannot be sued in the K. B. by bill; he waives the objection by pleading in chief. *The Earl of Lonsdale v. Littledale*, 2 H. B. 267, 299; 2 Anat. 356; *Hosier v. Lord Arundell*, 3 B. & P. 7.

PENAL ACTION, &c. 707

- (c 3) *Waiver, whether it enures for third persons.*

Occasional waiver by the defendant, of the privilege of peerage, does not waive it in an action at the suit of another plaintiff. *Fortnam v. Lord Rokeby*, 4 Taunt. 668.

II. ROMAN CATHOLIC.

- (a) *Privilege of,—of franking.*

The privilege of franking is not extended to roman catholic peers. *Lord Petre v. Lord Auckland*, 2 B. & P. 139.

PENAL ACTION AND INFORMATION.

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- (a) *In relation to the Statutes of Jeofails, p. 714.*

I. PROPERTIES OF.

- (a) *Penal actions.*

1. Penal actions are civil suits. *Atcheson v. Everitt, Cowp. 382.*
2. Distinction between penal and criminal actions. *Atcheson v. Everitt, Cowp. 391.*

II. MANNER OF COMMENCING.

- (a) *Preliminary affidavit.*

The st. 21 Jac. I, c. 4, requiring an affidavit in penal actions, that the offence was committed in the county where the venue is laid, &c. seems to be merely directory to the officer of the court, and does not make the affidavit essential to the validity of the proceedings; at least the court will not set aside the proceedings after verdict. *White v. Boot, 2 T.R.*

274, *contra*; *Leigh v. Kent*, 3 T. R. 362, *accord*.

(b) *To save the limitation of time.*

Suing out a *latitat*, is a sufficient commencement of a penal action to save the limitation of time. *Hardyman v. Whitaker*, 2 East, 573, n.

(c) *Irregularity in,—how waived.*

If an action on a penal statute is commenced in a mode prohibited by the statute, the objection is not waived by neglecting to take advantage of it in the first instance. *Goodwin v. Parry*; *Same v. Smith*, 4 T. R. 577.

III. OF THE BILL IN.

(a) *Loss of, how supplied.*

If the bill in a penal action be taken off the file, another may be supplied from an attested copy taken by the plaintiff when it was filed. *Petrie v. Benfield*, 3 T. R. 476.

IV. ON THE MODE OF SUING.

(a) *Whether qui tam.*

Where the statute gives half the penalty to the informer and half to the poor of the parish, the declaration may be either to render to the informer, or to the informer and the poor. *Frederic v. Lookup*, 4 Burr. 2018.

(b) *Whether in person or by attorney.*

An informer may sue in his own person on a penal statute. *La Grue v. Penny*, 2 H. B. 600.

(c) *Where sued.*

(c 1) *Whether before magistrates.*

1. By st. 21 Jac. I, c. 4, the jurisdiction of the courts at Westminster in actions on penal statutes antecedent to itself, is taken away only where the superior and inferior courts therein mentioned have a concurrent jurisdiction, both as to the subject matter and as to the mode of proceeding. *Shipman v. Henbest*, 4 T. R. 109.

2. The st. 21 Jac. I, c. 4, which prohibits proceedings on penal statutes in the courts at Westminster in all those cases where actions, &c. thereon may be brought in the inferior courts therein enumerated, does not extend to subsequent penal statutes. *Shipman v. Henbest*, 4 T. R. 109.

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3. An action on st. 39 Geo. III, c. 79, does not lie in the courts at Westminster, unless for a penalty exceeding 20 l.; no therefore, for two penalties of 20 l. each since the sum of 20 l. inserted in the form of declaration given by the statute, is either only *pro forma* or must be rejected as inconsistent with its express provisions. *Fleming v. Bailey*, 5 East, 313; 1 Smith, 504.

(d) *In particular instances.*

(d 1) *Against the vendor of coals.*

To found an action against the vendor of coals, not having obtained a coal-meter's ticket, for a penalty of 50 l. on 19 Geo. II, c. 35, s. 11, the plaintiff need not proceed to commit the offender before a justice of peace. *Peto v. Hague*, 1 Smith, 417.

V. ON THE JOINDER OF OFFENCES IN.

(a) *General rule.*

Distinct offences of a similar nature may be included in one action for the penalties incurred. *Holland v. Bothmar*, 4 T. R. 228.

VI. OF PARTIES TO.

(a) *The king.*

Where a statute divides a penalty between the king and a common informer, the king, if before hand, may sue for the whole. *Rez v. Hymer*, 7 T. R. 536.

(b) *The attorney general.*

Where the king is entitled to sue for a penalty, it may be by information in the K. B. in name of the attorney general. *Rez v. Hymer*, 7 T. R. 536.

(c) *A common informer.*

1. A common informer can only sue on his own account, where that privilege is given him by statute, either in express terms or by implication; not, therefore, on st. 39 Geo. III, c. 79, for a penalty under 20 l. for printing papers to be published, without adding the printer's name and abode. *Fleming v. Bailey*, 5 East, 313.

2. Though the st. 37 Geo. III, c. 90, gives an informer no authority in express terms to sue an attorney for not entering his certificate, yet such authority is implied to be thereby given, from the act being in *pari materia* with the 25 Geo. III, c. 80, which gave him that privilege.

F

Davis v. Edmonson, 3 B. & P. 382; *Barnard v. Gostling*, 1 N. R. 245; 2 East, 569.

(d) *Joinder of defendants in.*

1. Where two proctors or attorneys in partnership, practice without certificates, each is liable in a separate penalty, and must therefore be sued in a separate action. *Barnard v. Gostling*, 1 N. R. 245; 2 East, 569.

2. On the joinder of several defendants in the same information. *The Attorney General v. Corporation of Plymouth*, Wightw. 134.

VII. ON THE VENUE IN.

(a) *General rule.*

The statute 31 Eliz. c. 5, s. 2, which forbids "the offence against any penal statute being laid in any other county than where it was committed," is still in force, and applies to penal statutes passed, as well subsequent as antecedent to it. *Barber v. Tilson*, 3 M. & S. 499.

(b) *In particular instances.*

(b 1) *Action against a vendor of coals.*

Under st. 3 Geo. II, c. 26, s. 4, against selling coals, represented to be of a different quality from what they really are, the offence is completed, and the action therefore for the penalty must be brought in the county in which they have been delivered, though the contract of sale was made in a different county. *Butterfield v. Windle*, 4 East, 385.

(b 2) *Action against a tanner.*

The venue of an information on 24 Geo. II, c. 19, for being both a tanner and a shoemaker, need not be in the county where the offence was committed. *The Attorney General v. Ferris*, 3 Anst. 871.

(c) *Of changing the venue in.*

The court will change the venue in a penal action on the usual affidavit, as well as in any other. *Wyns v. Bellman*, 1 Mars. 320; 5 Taunt. 754; 6 Taunt. 122.

VIII. OF THE DECLARATION IN.

(a) *Of the averment of time.*

1. *Seem*, that where a penal action is limited to a certain time, a declaration for the penalty need not aver that the act was committed within the time prescribed. *Lee v. Clarke*, 2 East, 333.

2. Where a penal action is limited to six lunar months after the offence committed, and the declaration avers that the offence was committed within six calendar months, no objection can be taken after verdict, since the plaintiff must have proved that his suit was commenced within the time prescribed, or he could not have recovered. *Lee v. Clarke*, 2 East, 333.

(b) *Of negative averments.*

1. It is a settled rule, that in declaring for a penalty under an act of parliament, the declaration must negative that the defendant is within any of the exceptions contained in the clause which creates the offence. If exemptions are introduced by a subsequent clause, they are matters of defence. *Spicer v. Parker*, 1 T. R. 141.

2. If an exemption from the penalty of a former statute is made by a subsequent one, it is matter of defence, and the plaintiff, therefore, in an action for the penalty, need not negative that the defendant is within it. *Rex v. Hall*, 1 T. R. 320.

3. In an information on a penal statute, any exceptions in the clause enacting the forfeiture, or in a previous clause to which it refers, must be negatived, though not those in a subsequent clause. *Rex v. Pratten*, 6 T. R. 559.

4. The rule is inveterate, that if there be a substantive proviso in an act of parliament creating an exception, it is for the party who would bring himself within it to plead it. Thus the statute 43 Geo. III. c. 84, prohibits, under a penalty, a spiritual person from absenting himself from his benefice for more than a certain time in any one year. There is a proviso excepting benefices that have vicars endowed, or perpetual curate, and have no cure of souls. By the above rule, an informer suing for the penalty need not aver that the defendant's benefice, a rectory, has cure of souls. The argument, *contra*, was, that the rule only applied where a party claims an exception introduced in his favour; but here the plaintiff has not brought the benefice within the description in the statute. *Cuthcart v. Hardy*, 2 M. & S. 534; 5 Taunt. 2.

(c) *In miscellaneous instances.*

(c 1) *For post-dating a draft.*

In an information for post-dating a draft, it is not necessary to set it out in

the language in which it was originally drawn. *Attorney General v. Valabreque*, Wightw. 9.

IX. OF THE PLEA IN.

(a) *How entitled.*

A plea in an action *qui tam*, not entitled *qui tam*, nor describing the plaintiff as suing *qui tam*, is not such a nullity as that the plaintiff can sign judgment as for want of a plea. *Dale v. Beer*, 3 Smith, 243; 7 East, 333.

(b) *Of the plea in abatement.*

A plea in abatement to a penal action of another action depending, must shew that the right of action was attached in the other suit before the plaintiff's action was commenced. *Combe v. Pitt*, 3 Barr. 1423; 1 Blk. 437.

(c) *Of the plea of nil debet, or not guilty.*

Semble, that a plea of not guilty to debt on a penal statute is good, since the defendant is charged with an offence. At least the plea cannot be treated as a nullity. *Coppin v. Carter*, 1 T. R. 462.

(d) *Of double fees.*

The proviso in sect. 7, of stat. 4 Anne, c. 16, which allows double pleading, that "nothing in this act before contained shall extend to any writ, bill, action, or information upon any penal statute," is imperative, and excludes double pleading in penal actions. *Heyrick v. Foster*, 4 T. R. 700.

X. OF THE TRIAL IN.

(a) *Of several offences.*

In penal actions the court will rather require that the trial of each offence should be separated as much as possible for the convenience of trial. *Benton v. Praed*, 1 Smith, 423.

(b) *Postponement of.*

(b 1) *From the non-return of a commission to examine witnesses.*

The court will not postpone the trial of an information on the application of the defendant, on the ground of his commission to examine witnesses abroad not having been returned, if they think that there has been sufficient time for its return. It should be stated in the affidavit, in support of such an application, that the

return is expected, and when. *Attorney General v. Laragoty*, 3 Price, 221.

(b 2) *From miscellaneous causes.*

If the trial of an information has been once postponed at the instance of the Attorney General, *pro defectu juratorum*, the court will also grant the defendant a rule to shew cause why the trial should not be further postponed on his application, if in the mean time a material witness, deposed to have been ready on a former occasion, is not forthcoming. *Attorney General v. Hughes*, 3 Price, 35.

XI. OF THE EVIDENCE IN.

(a) *Of the time of commencement.*

1. The production of the writ shews that a *qui tam* action is commenced in time, without evidence to connect the writ with the action. *Hutchinson v. Piper*, 4 Taunt. 555; provided the declaration appears to have been filed in time. *Thistlewood v. Cracroft*, 6 Taunt. 141; 1 Mars. 497. Of which, in C. B. the *placitum* furnishes no proof. *Ibid*.

2. A writ is sued out in a penal action within the time limited, returnable in Easter term 1813, but which is never returned. The issue is of Hilary term 1815. It is objected that the action was not brought in time. In answer, the plaintiff produces rules for time to declare from Michaelmas term 1813 to Trinity 1814. Held that this was not sufficient evidence to connect the declaration with the writ from which the court could presume that the declaration had been filed in time. *Thistlewood v. Cracroft*, 1 Mars. 497; 6 Taunt. 141.

(b) *In an action against the vendor of coals.*

A penalty is inflicted by stat. 3 Geo. II. c. 26, s. 13, on coal dealers who shall neglect to fill the sacks sent out from a measure prescribed by the act. Proof that the coals, on being re-measured at the place of delivery, were short of the proper quantity, and the testimony of one who saw the coals delivered out of the barge into the cart, and who continued with them until re-measured, that he saw no bushel used, is sufficient proof of a neglect within the statute. *Warren v. Wmille*, 3 East, 205. And even without such

testimony, the former evidence is presumptive proof in support of an averment in an action on the statute, that the coals had not been justly measured within the statute. *Ibid.*

XII. OF THE VERDICT IN.

(a) Application of.

If in a penal action there is a general verdict for one penalty, which the plaintiff applies to a particular count, he cannot, on discovering that the count is defective, apply it to another. *Holloway v. Bennet*, 3 T. R. 448.

XIII. OF THE DAMAGES AND COSTS IN.

A common informer cannot have damages for the detention of the debt, nor, consequently, costs of increase founded upon such damage. *Frederic v. Lookup*, 4 Burr. 2018.

XIV. OF THE JUDGMENT IN.

(a) Whether of misericordia, or capiatur.

In a penal action, judgment either of misericordia or of capiatur, may be entered. *Humble v. Bland*, 6 T. R. 255.

XV. OF AMENDMENT IN.

(a) General rule.

1. There is no difference between civil and penal actions, in respect to amendments at common law. *Benfield v. Milner*, 2 Burr. 1098.

2. Where no time has been lost, so as not to keep a penal action improperly hanging over the defendant's head, the court will give leave to amend in this as in other civil actions. *Mestaer v. Hesty*, 3 M. & S. 450.

(b) After the time of limitation has elapsed.

1. Though in regard to amendments, there is no difference between civil and penal actions, yet, an amendment in a penal action will not be allowed in exclusion of a plea of the Statute of Limitations. *Goff v. Popplewell*, 2 T. R. 707.

2. Leave to amend, in a penal action, will be refused after the period of limitation has expired. *Steel v. Lowerby*, 6 T. R. 171.

3. The rule, that an amendment in a penal action, will not be allowed after its time of limitation has expired, only holds where the informer has been guilty of

delay after action brought; and to preclude him introducing a new substantive cause of action. *Cross v. Kaye*, 6 T. R. 543; *Maddock v. Hammet*, 7 T. R. 5; *Rankin v. Marsh*, 8 T. R. 30.

4. An amendment in the venue, changing it from one county to another, will not be allowed in a penal action, after the time of limitation, without an affidavit, that the cause meant to be proved in the new county, was in every respect the same as that originally intended, unless it appear, from the particularity of the declaration, that no other cause or fact could be proved in the new county; or, if it is admitted that a new cause is meant to be insisted on, unless it be sworn that the plaintiff, through mistake, supposed from the first that he might give it in evidence in the action laid in the original county. *Petre v. Craft*; *Dover v. Mestaer*, 4 East, 435.

5. The court will not, in a penal action, alter the term of which a declaration is entitled to a previous term, in order to bring it within the time limited for the action. *Woodroffe v. Williams*, 1 Mars. 419; 6 Taunt. 19.

(c) After the record has been withdrawn.

The declaration in an action on a penal statute, may be amended after record made up, carried down to trial, and withdrawn by plaintiff. *Mace v. Lovett*, 5 Burr. 2833.

(d) By the Attorney General.

The Attorney General may, at any time, amend a revenue information. *The Attorney General v. Henderson*, 3 Anst. 714.

XVI. OF DISCONTINUANCE IN.

(a) Whether aided by verdict.

The stat. 32 Hen. VIII, c. 30, by which a discontinuance is aided, extends as well to actions on statutes, *qui tam* for instance, as others. *Humble v. Bland*, 6 T. R. 255.

XVII. OF COMPOUNDING AND STAYING.

(a) Terms of.

1. Proceedings in a *qui tam* action, will not be stayed till costs on a non-pros in a former action, by a different plaintiff, for the same cause, are paid. *English v. Cox*, Cowp. 322.

2. The crown (being interested) will not allow a penal action to be compounded, in which costs are not recoverable, unless on the terms of sharing with the plaintiff the sum agreed to be paid for costs. *Lec v. Cass*, 2 Taunt. 213.

(b) *Relative to the consent of the crown.*

1. As well before as after verdict, the consent of the crown is necessary to compound a penal action, where the king shares in the penalty. *Howard v. Sowerby*, 1 Taunt. 103.

2. The consent of king's counsel is requisite to compound a penal action, where part of the penalty goes to the crown. *Sheldon v. Mumford*, 5 Taunt. 268.

(c) *Relative to payment of the king's share.*

1. On compounding a penal action, the king's part of the composition must be first paid. *Wood v. Ellis*, 2 Blk. 1154.

2. Where the court give leave to compound a penal action, the king's half of the composition must be paid into the hands of the master of the crown office, for the use of his majesty. *Brown v. Bailey*, 4 Burr. 1929.

(d) *After verdict.*

1. A penal action may be compounded after verdict. *Maughan v. Walker*, 5 T. R. 98.

2. Where part of the penalty is given to the king, a penal action cannot *pro tanto* be compounded after verdict. *Biery v. Levy*, 1 Blk. 443.

3. Leave to compound a penal action will not be granted after verdict, except under favourable circumstances. *Crowder v. Wagstaff*, 1 B. & P. 18.

(e) *On rescinding the order for.*

Though the compromising of a penal action be through mistake, the order will not be rescinded. *Wright v. Stevenson*, 5 Taunt. 850.

(f) *On the remedy for the composition.*

Where proceedings in a penal action are stayed on payment of a sum of money, there is an absolute undertaking on the defendant's part to pay that sum; so that an attachment will be granted on non-payment. *Rex v. Clifton*, 5 T. R. 257; *Hart v. Draper*, 2 Mars. 358.

(g) *In particular instances.*

Where, on a penal action on 13 Geo. II, c. 19, a part of the penalty was given to the poor, the court would not give the parties leave to compound, the overseers, at a vestry, having agreed to compound, without receiving any part of the penalty. *Hunson v. Sprange*, 2 Smith, 195.

XVIII. MISCELLANEOUS PRACTICE
RELATIVE TO.

(a) *View in.*

In an information for duties against the proprietors of a glass manufactory, the court will not grant a view of the premises where the question may be tried by the production of a model. *Attorney General v. Green*, 1 Price, 130.

(b) *In suits against two or more who defend separately.*

(b 1) *Notices, how served.*

Where the defendants in a joint information, employ two different attorneys and clerks in court, if notice of trial be served on one of them only, and a verdict be obtained, the court will set it aside; and award a new trial as to both, notwithstanding the offence charged be one, which would affect them both as partners in trade. The costs of the trial already had, to abide the event of the second verdict. *Attorney General v. Stevens*, 3 Price, 72.

XIX. ABUSE OF.

(a) *How corrected.*

If grounds are laid for suspicion that a *qui tam* action is prosecuted for the issue money only, it will be ordered to be paid into court to abide the event, though the defendant do not swear to merits or his innocence. *Parker v. Macfarlan*, 3 T. R. 137.

XX. SUED AFTER THE PERIOD OF
LIMITATION.

(a) *Objection to, how taken.*

1. In a penal action, if the writ be not sued out till after the year, though by relation it would be within the time, the plaintiff should be nonsuited; and the writ may be produced in evidence, to shew the day on which it was actually sued out. *Morris v. Pugh*, B. N. P. 195; 3 Burr. 1241; 1 Blk. 312.

2. Where a forfeiture has been incurred

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under a penal statute, no debt is vested in the informer until the process be sued out; and none can vest in him, unless the process is sued out within the time limited; which is the reason why the defendant is not put to plead that the time of limitation has expired. *Petrie v. White*, 3 T. R. 11.

XXI. MISCELLANEOUS.

(a) *In relation to the statutes of jeofails.*

The statutes of jeofails extend to penal actions, though not to criminal prosecutions. *Atcheson v. Everitt*, Cowp. 392.

PENAL STATUTE.

I. RELATIVE TO OFFENCES AGAINST.

(a) *Whether one or many.*

(a 1) *General rule*, p. 714.

(a 2) *In the case of the sale of books reprinted abroad*, p. 714.

II. RELATIVE TO ACTS IN VIOLATION OF.

(a) *Whether void*, p. 714.

III. IN RELATION TO SUBSEQUENT STATUTES.

(a) *Whether accumulative to the former*, p. 714.

IV. ON THE CONSTRUCTION OF.

(a) *General rules*, p. 714.

(b) *In particular instances.*

(b 1) *Against abuses on arrests*, p. 715.

(b 2) *The attorney's Certificate Act*, p. 715.

(b 3) *The Auction Act*, p. 715.

(b 4) *The term "proceeding by bill" in 18 Eliz. c. 5, defined*, p. 715.

(b 5) *Relative to the sale of bread*, p. 715.

(b 6) *Relative to brokers*, p. 715.

(b 7) *Relative to the sale of coals*, p. 715.

(b 8) *Relative to fraudulent conveyances*, p. 715.

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PENAL STATUTE.

(b 10) *The Durham Voting Act*, p. 716.

(b 11) *Relative to glass*, p. 716.

(b 12) *The Habeas Corpus Act*, p. 716.

(b 13) *Relative to the sale of hides*, p. 716.

(b 14) *Relative to hops*, p. 716.

(b 15) *Against the importation of butter from Ireland*, p. 716.

(b 16) *Relative to the sale of plate*, p. 716.

(b 17) *Relative to soap*, p. 716.

(b 18) *Relative to shipping,—giving a false account of goods in a boat*, p. 716.

I. RELATIVE TO OFFENCES AGAINST.

(a) *Whether one or many.*

(a 1) *General rule.*

Where an offence, created or made penal by statute, is in its nature single, a single penalty only can be recovered, though several join in committing it. But if the offence is in its nature several, each offender is separately liable to the penalty. *Rex v. Clarke*, Cowp. 610.

(a 2) *In the case of the sale of books reprinted abroad.*

The st. 12 Geo. II, c. 36, prohibits the sale of books first composed and published in this kingdom, and reprinted elsewhere, under the penalty of 5*l.* and double the value of every book. Every distinct sale, though on the same day, is a separate offence. *Brooke v. Milliken*, 3 T. R. 509.

II. RELATIVE TO ACTS IN VIOLATION OF.

(a) *Whether void.*

Where a statute, declaring a particular act void, likewise makes it penal, it is utterly void. *Gye v. Felton*, 4 Taunt. 876.

III. IN RELATION TO SUBSEQUENT STATUTES.

(a) *Whether accumulative to the former.*

Subsequent statutes, which only add accumulative penalties, do not repeal former statutes. *Rex v. Jackson*, Cowp. 297.

IV. ON THE CONSTRUCTION OF.

(a) *General rules.*

1. It is not a rule, that courts, in the

exposition of penal statutes, are to narrow the construction. Where the sense is doubtful, they are to be construed in favour of the supposed offender; but where it is plain, they must be literally followed. *Res v. The Inhabitants of Hodnett*, 1 T.R. 101.

2. A penal statute cannot be extended to other cases than those intended by the legislature, even though within the mischief aimed at. *Jenkinson v. Thomas*, 4 T.R. 665.

(b) *In particular instances.*

(b 1) *Against abuses on arrests.*

The stat. 32 Geo. II, c. 28, giving a penalty for carrying a person to prison within twenty-four hours after arrest, is confined to arrests on mesne process, and which areailable. *Evans v. Atkins*, 4 T.R. 555.

(b 2) *The Attorney's Certificate Act.*

1. One acting as an attorney, though he be not such, is liable to the penalty under the Certificate Act, 25 Geo. III, c. 80, (37 Geo. III, c. 90). Therefore, when sued for the penalty, it is sufficient to aver that he acted as an attorney. *Cross v. Kaye*, 6 T.R. 663.

2. The Attorney's Certificate Act, 25 Geo. III, c. 80, (37 Geo. III, c. 90) does not extend to the county court, though an attorney prosecute a suit therein for more than 40s. by virtue of a justices. *Cross v. Kaye*, 6 T.R. 663.

(b 3) *The Auction Act.*

It seems that an auctioneer duly licensed does not, by selling goods by auction within the city of London, incur the penalty imposed by stat. 6 Ann, c. 16. *Wilkes v. Ellis*, 2 H. B. 555.

(b 4) *The term "proceeding by bill," in 18 Eliz. c. 5, defined.*

A proceeding by bill is an original action, within the stat. 18 Eliz. c. 5; since original, as there used, does not mean original writ, but original action, as contradistinguished from proceedings in inferior courts and the Star Chamber, where the proceedings were in a summary way, by libel or complaint. *Leigh v. Kent*, 3 T.R. 262, 265, n. (a).

(b 5) *Relative to the sale of bread.*

The offence is complete, though the

wholesale seller direct the purchaser not to re-sell until the expiration of the twenty-four hours. *Res v. Smith*, 8 T.R. 588.

(b 6) *Relative to brokers.*

A person who for brokerage and hire negotiates and concludes bargains for stocks, is a broker in point of law. *Janssen v. Green*, 4 Burr. 2103.

(b 7) *Relative to the sale of coals.*

1. The stat. 26 Geo. III, c. 26, was not revived, from the time of its expiration, by stat. 42 Geo. III, c. 89; since the provision in the latter statute, which may be supposed to have that effect, is only to indemnify those who have acted under the provisions of the former, supposing them still subsisting when they were not. *Warren v. Windle*, 3 East, 205.

2. A vendor of coals by the chaldron, or lesser quantity, is liable to the penalty inflicted by stat. 3 Geo. II, c. 26, s. 13, for not meting the coals with the Queen Ann bushel, whether the sale is by pool or wharf measure. *Parish v. Thomson*, 3 East, 525.

3. Under stat. 3 Geo. II, c. 26, s. 13, the offence of filling sacks with coals for sale, without first having duly measured them at the wharf or warehouse, is local, and the action, therefore, for the penalty, must be brought in the county where the wharf or warehouse lies. *Butterfield v. Windle*, 4 East, 385.

4. *Semble*, a coal waggon is within the 19 Geo. II, c. 35, s. 11, though the act contains only the words "cart or carts." *Peto v. Hague*, 1 Smith, 417.

(b 8) *Relative to fraudulent conveyances.*

1. That the penalty of the st. 13 Eliz. c. 5, against fraudulent gifts, &c. may be incurred, it is necessary that the creditor be actually defrauded of payment of his debt, which he cannot be said to have been, where, having a lien upon the property, as under a distress or otherwise, he voluntarily relinquishes it to the defendant insisting on his (fraudulent) claim. *Meur v. Howell*, 4 East, 1.

2. That a judgment, &c. may be avoided, and a penalty incurred under st. 13 Eliz. c. 5, not alone must the creditor have been prevented satisfying his demand; the judgment, &c. must have been obtained originally from the motive of

preventing him, and *semble*, from that alone: *Meux v. Howell*, 4 East, 1.

3. *Semble*, that the stat. 13 Eliz. c. 5, extends to the making penal not only the giving of bonds, but likewise of all the other securities therein mentioned, under the circumstances therein described. *Meux v. Howell*, 4 East, 1.

(b 9) *The term "division," defined.*

Where a penalty is given to the treasurer of a county, riding, or division, the word "division" must receive its legal not its popular sense, and therefore is inapplicable to parts of a county to which the magistrates (acting under one general commission) for convenience, adjourn the quarter sessions, appointing a separate treasurer to each. *Evans v. Stevens*, 4 T. R. 224, 459.

(b 10) *The Durham Voting Act.*

Voting, under a claim to vote as a freeman only, though without right, is not an offence within the Durham Act, 3 Geo. III, c. 15, where the party is entitled to vote in some other right; which last, therefore, must be negatived in an action on the statute. *Daman v. Marrett*, 1 Taunt. 128.

(b 11) *Relative to glass.*

1. Breaking the moiles of glass bottles into the pot, is a putting in fresh materials, within the 17 Geo. III, c. 39. *Attorney General v. Parke*, 1 Anst. 240.

2. The 27 Geo. III, c. 28, s. 15, by the word "square," means all rectangular figures. *The Attorney General v. The Cast Plate-Glass Company*, 1 Anst. 39.

(b 12) *The Habeas Corpus Act.*

That the gaoler may incur the penalty for withholding a copy of the commitment, personal service, if within the prison, is necessary. *Huntley v. Luscombe*, 2 B. & P. 530.

(b 13) *Relative to the sale of hides.*

A tanner selling hides by retail is not within the penalties of 24 Geo. III, c. 19. *The Attorney General v. Dennis*, 1 Anst. 266.

(b 14) *Relative to hops.*

The stat. 7 Geo. II, c. 19, s. 2, makes it penal to mix with hops any drug or ingredient, or other thing whatsoever, to

alter the colour or scent thereof. This extends as well to ingredients that are beneficial as to those which deteriorate; therefore to vapour of sulphur and brimstone. *Rex v. Pack*, 6 T. R. 374.

(b 15) *Against the importation of butter from Ireland.*

Butter exported from Ireland to Lisbon, and from Lisbon into this kingdom, was held not to be considered as included in the statutes which prohibited the importation of it from Ireland into this kingdom. *Rex v. Bell*, 2 Burr. 1173.

(b 16) *Relative to the sale of plate.*

The penalty inflicted by st. 31 Geo. II, c. 32, s. 6, for selling plate without a license, only attaches upon those who use the trade of vending plate. *Rex v. Buckle*, 4 East, 346.

(b 17) *Relative to soap.*

A concealment of soap, in violation of the 1 Geo. I, stat. 2, c. 31, may be in an entered place, and by mixing with other soap, although done with the privity of the inferior attending officer. *The Attorney General v. Brewster*, 2 Anst. 560.

(b 18) *Relative to shipping,—giving a false account of goods in a boat.*

The penalty of 10 s. per ton imposed by 8 Geo. III, c. 38, for giving a false account of goods in a boat, is not to be calculated upon the gross weight of goods contained in the boat, but only upon the difference between the weight or quantity given in, and the weight or quantity contained in the boat. *Minors v. Houghton*, Cowp. 585.

PENALTY.

I. WHETHER A PENALTY, OR LIQUIDATED DAMAGES.

(a) *Penalty*, p. 717.

(b) *Liquidated damages*, p. 717.

II. RELATIVE TO THE STATUTE— 8 & 9 W. III.

(a) *Of securities within the act.*

(a 1) *General rule*, p. 717.

(a 2) *Bond payable by instalments*, p. 717.

(a 3) *Bond to perform an award*, p. 717.

(b) *On the suggestion of breaches under*.

(b 1) *Whether compulsory*, p. 717.

(b 2) *Form of*, p. 718.

(c) *On the assessment of damages under*, p. 718.

(d) *On the judgment under*, p. 718.

(e) *On the execution under*.

(e 1) *Extent of*, p. 718.

(e 2) *Scire facias, when requisite*, p. 718.

III. OF RECOVERING DAMAGES BEYOND THE PENALTY.

(a) *General rules*, p. 718.

(b) *In a particular instance*, p. 718.

IV. MISCELLANEOUS.

(a) *In relation to an alternative contract*, p. 718.

I. WHETHER A PENALTY, OR LIQUIDATED DAMAGES.

(a) *Penalty*.

1. Where the question is, whether the sum be intended as a penalty or not, if a certain damage, less than that sum, is made payable on the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty. *Astley v. Weldon*, 2 B. & P. 346.

2. Where an agreement contains a variety of stipulations, and a sum is annexed to a breach of performance, that sum must be considered as a penalty, not as liquidated damages. *Astley v. Weldon*, 2 B. & P. 346.

3. Where the sum is denominated a "penalty," it cannot be considered as stipulated damages. *Smith v. Dickenson*, 3 B. & P. 630.

(b) *Liquidated damages*.

1. Where the condition of a bond is for the performance of certain work within a specified time, and the payment of a certain sum weekly for every week beyond the time during which the work shall remain unfinished, such payments are to be considered not as penalties but as liquidated damages. *Fletcher v. Dyche*, 2 T. R. 32.

2. Where one gives a counter-security to another, containing a covenant to pay an annuity, and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed, that in default of any one payment of the annuity, judgment shall be entered up, and execution issue for the whole sum specifically, being the price of the annuity; it is not necessary to assign breaches under 8 & 9 W. III, c. 11, s. 8; but execution may issue for the whole sum. *Howell v. Stratton*, 2 Smith, 66.

3. See the case of *Wilson's Charity*. *Lofft*, 555.

II. RELATIVE TO THE ST. 8 & 9 W. III.

(a) *Of securities within the act*.

(a 1) *General rule*.

In debt on bond with a condition for the doing of any thing else but the payment of a gross sum of money, or the appearance of the defendant in a bail bond, or replevin bond, where the action is brought by the assignee of the sheriff, the plaintiff is bound to suggest breaches on the roll, in pursuance of stat. 8 & 9 W. III, c. 11, s. 8; therefore in debt on an annuity bond. *Walcot v. Goulding*, 8 T. R. 126.

(a 2) *Bond payable by instalments*.

A bond for payment of money by instalments yearly, with a separate agreement that the forfeiture of the condition is not to extend to accelerate the payment, is within the stat. 8 & 9 W. III, c. 11, s. 8. *Willoughby v. Swinton*, 2 Smith, 663; 6 East, 550.

(a 3) *Bond to perform an award*.

A bond conditioned to perform an award is within 8 & 9 W. III, c. 11. *Welch v. Ireland*, 6 East, 613; 2 Smith, 666.

(b) *On the suggestion of breaches under*.

(b 1) *Whether compulsory*.

The stat. 8 & 9 W. III, c. 11, s. 8, relative to the suggestion of breaches in actions for penalties, is compulsory on the plaintiff, who therefore cannot proceed at common law by entering judgment for the penalty, without suggesting breaches, and assessing damages thereon. *Roles v. Rosewell*, 5 T. R. 598; *Hardy v. Bern*, *Id.* 540, 636; *Welch v. Ireland*, 2 Smith, 666; 6 East, 613.

(b 2) *Form of.*

1. A jury may assess damages under stat. 8 & 9 W. III, c. 11, though the breach (here a single one) is not assigned by the term "according to the form of the statute." *Tomba v. Painter*, 13 East, 1.

2. A suggestion of the breach of the condition of a bond, under st. 8 & 9 W. III, c. 11, s. 8, cannot be introduced as part of a replication which is compleat without it. *De La Rue v. Stewart*, 2 N. R. 362.

3. In debt on bond a replication which denies the defendant's averment of performance, and concludes to the county, and then assigns breaches, is bad on demurrer. And if the defendant, instead of demurring, take issue and go to trial on the question of performance, a repleader will be awarded after verdict. *Plomer v. Ross*, 1 Mars. 95; 5 Taunt. 386.

4. If, in debt on bond, the defendant plead *non est factum*, the plaintiff may suggest breaches on the roll, pursuant to the statute 8 & 9 W. III, c. 11, s. 8. *Ethersey v. Jackson*, 8 T. R. 255.

(c) *On the assessment of damages under.*

1. In debt for a penalty in articles, the jury ought to assess damages upon the breach assigned, pursuant to the statute, and must not find the debt. *Drage v. Brand*, 2 Wils. 377.

2. Where it was apparent on the record that a writ of enquiry, under stat. 9 & 10 W. III, c. 11, after judgment for the plaintiff on *nul tiel* record, was necessary, he was permitted, after error allowed, to execute it, and sign a new judgment; the defendant consenting, on the terms of paying costs, and placing the defendant in *status quo*, &c. *Hanbury v. Guest*, 14 East, 401.

- (d) *On the judgment under.*

1. In debt for a penalty for non-performance of covenants, judgment on demurrer may be entered up for the penalty, in like manner as before the stat. 8 & 9 W. III, c. 1, though it will only stand as a security. *Goodwin v. Crowle*, Cowp. 367.

2. Where on judgment by default in debt on bond, judgment for the penalty is taken, and afterwards a second judgment entered for the damages assessed on the inquiry, such second judgment is erro-

neous. *Hankin v. Broomhead*, 3 B. & P. 607.

(e) *On the execution under.*(e 1) *Extent of.*

Execution shall not be levied on an annuity bond, and judgment for the whole penalty, but only for the arrears of the annuity and the judgment stand as a security for future arrears. *Ogilvie v. Foley*, 2 Blk. 1111.

(e 2) *Scire facias, when requisite.*

In a judgment on a bond to pay an annuity, if a *fi. fa.* be sued out, and marked for only part of the penalty, a new *fi. fa.* for subsequent arrears cannot be taken out without a *sci. fa.* under stat. 8 & 9 W. III, c. 11. *Howell v. Hanforth*, 2 Blk. 843.

III. OF RECOVERING DAMAGES BEYOND THE PENALTY.

(a) *General rules.*

1. A bond for performance of covenants or agreements is only a security to the extent of the penalty. *White v. Sealy*, Dougl. 49; *Wilde v. Clarkson*, 6 T. R. 303, *accord.*; *Lord Lonsdale v. Church*, 2 T. R. 388, *contra*. See *McClare v. Dunkin*, 1 East, 436.

2. Where there is a special penalty in a covenant, the party may either go for the penalty or for damages. *Winter v. Trimmer*, 1 Blk. 395.

3. There is a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case the obligee has his election. He may either bring debt for the penalty and recover, when he cannot afterwards resort to the covenant; or he may proceed upon the covenants and recover more or less than the penalty, *toties quoties*. *Lowe v. Peers*, 4 Burr. 2228.

(b) *In a particular instance.*

Where a penalty was subjoined to a charter-party containing various stipulations; held, that damages might be recovered beyond it. *Harrison v. Wright*, 13 East, 343.

IV. MISCELLANEOUS.

(a) *In relation to an alternative contract.*

Upon an optional agreement, if one part of the alternative is prohibited, and sub-

ject to a penalty, the party having made his option for that part, shall incur the penalty. *Layton v. Pearce*, Dougl. 15.

PERJURY.

I. ON THE ESSENTIALS OF THE CRIME.

- (a) *General rules*, p. 719.
- (b) *In relation to the time at which the oath was taken*, p. 719.

II. ON THE INDICTMENT FOR.

- (a) *Where the perjury was by affidavit*, p. 719.
- (b) *Averment of the court or authority before whom, &c.* p. 719.
- (c) *Averment of the materiality of the question.*
 - (c 1) *Whether necessary*, p. 719.
 - (c 2) *Form of*, p. 719.
- (d) *Averment of the joinder in issue*, p. 720.
- (e) *Averment of the event of the cause*, p. 720.
- (f) *Defects in, whether aided by* 23 Geo. II, c. 11, p. 720.
- (g) *Plea to.*
 - (g 1) *Auter fois acquit*, p. 720.
- (h) *Evidence in.*
 - (h 1) *On indictment for perjury in an answer in Chancery*, p. 720.
 - (h 2) *On indictment for perjury at an election*, p. 720.

I. ON THE ESSENTIALS OF THE CRIME.

- (a) *General rules.*

The requisites essential to the crime of perjury are, 1. The oath must be taken in a judicial proceeding, before a competent jurisdiction; 2. It must be material to the question depending. *Rex v. Aylett*, 1 T. R. 63. And wilful, *Lofft* 771.

- (b) *In relation to the time at which the oath was taken.*

An affidavit, if false, incurs the crime of perjury (all other essentials existing) at what time soever it may be sworn. *Baskett v. Barnard*, 4 M. & S. 333.

II. ON THE INDICTMENT FOR.

- (a) *Where the perjury was by affidavit.*

1. In alleging perjury to have been committed in an affidavit in any court, &c. it is sufficient to state, that the defendant came before the court, and exhibited the affidavit, or paper writing, that court having competent authority, &c. and that he swore falsely such and such things; without adding that any use was afterwards made of the affidavit, or referring to the files of the court. For the guilt of the defendant cannot depend upon the subsequent use made of the affidavit. *Rex v. Crossley*, 7 T. R. 315.

2. An indictment for perjury, under the statute of Elizabeth, by which an action is given to the party injured by the false oath, must aver that the affidavit was produced and used against that party. *Rex v. Crossley*, 7 T. R. 315.

- (b) *Averment of the court, or authority before whom, &c.*

1. An indictment for perjury stated the court to have been holden "before A. B, and C, and others their fellows, under a commission of oyer and terminer, to the said A, B, and C, and others, and any two of them, of whom the said A, B, and C. should always be one." Held, that the commission, though inaccurately expressed, meant that one of the quorum should be present. *Rex v. Dowlin*, 5 T. R. 311.

2. There is an application to the court of K. B. and rule thereon, that an attorney may answer the matters of an affidavit. In an indictment for perjury in his answer, it was held unnecessary to allege where the court was holden when the application and rule were made. *Rex v. Crossley*, 7 T. R. 315.

- (c) *Averment of the materiality of the question.*

- (c 1) *Whether necessary.*

In an indictment for perjury, the averment that the question was material is essential, and its omission is not cured by verdict. *Rex v. McKeron*, 5 T. R. 316.

- (c 2) *Form of.*

In an indictment for perjury, it was not necessary, even at common law, to shew by detail how the question upon which, &c. was material, but merely to aver that

it was so. Still less since the stat. 23 Geo. II, c. 11. *Rex v. Dowlin*, 5 T. R. 311.

(d) *Averment of the joinder in issue.*

In an indictment for perjury at a trial, it is not necessary to state that issue was joined, or any thing more than that there was a certain cause, &c. and that it came on to be tried in due form of law. *Rex v. Dowlin*, 5 T. R. 311.

(e) *Averment of the event of the cause.*

In an indictment for perjury on a trial, the event of the cause need not be stated, since the crime is not affected by it. *Rex v. Dowlin*, 5 T. R. 311.

(f) *Defects in, whether aided by*
23 Geo. II, c. 11.

An indictment for perjury, drawn as at common law, if defective as such, is not aided as an indictment under st. 23 Geo. II, c. 11. *Rex v. Dowlin*, 5 T. R. 311.

(g) *Plea to.*

(g 1) *Auter fois acquit.*

A plea of *auter fois acquit*, may be pleaded to an indictment for perjury in an affidavit, where the only distinction between the two indictments, which were both in Middlesex, is, that the former averred that the affidavit was sworn in Middlesex, as appears by the record there; whereas the latter omitted the *prout patet*, and set forth the *jurat* of the affidavit, which expressed that it had been sworn in London. *Rex v. Emden*, 9 East, 437.

(h) *Evidence in.*

(h 1) *On indictment for perjury in an answer in chancery.*

In indicting for perjury upon an answer in chancery, there is no need to prove the identity of the person, or the actual swearing. *Rex v. Morris*, 2 Burr. 1189.

(h 2) *On indictment for perjury at an election.*

On an indictment for perjury at an election, in polling in the name of A. on a certain day, evidence that the defendant, not being a freeholder and entitled to vote, polled and was sworn, though it does not appear by what name, is evidence to be left to the jury that he polled in the name of A, and in that name took a false oath. *Rex v. Price*, 2 Smith, 525; 6 East, 323.

PETER HOUSE COLLEGE.

(a) *Statutes relative to.*

(a 1) *Construction of.*

1. Under the statute *de electione magistrorum* of Peter-house college, Cambridge, the bishop of Ely has only a discretion which of the two candidates presented to him by the fellows he will prefer. He cannot enquire into their fitness; a question to be decided by the fellows alone: in selecting one, therefore, he does not act in his capacity of visitor, but under a definite power, delegated by the statute. *Rex v. The Bishop of Ely*, 2 T. R. 290.

2. The meaning of the statute *de prefec-tione et qualitate magistrorum* of Peter-house College, Cambridge, is, that in the election of a master, regard shall always be had to the scholars, so that if there be any among them who are qualified, they shall be preferred to all others; but if there be none such among the scholars, then the two to be returned to the bishop shall be taken from among other persons indifferently. *Rex v. The Bishop of Ely*, 2 T. R. 290.

PEW.

I. FACULTY FOR.

- (a) *Nature of the right thereby conferred*, p. 720.
- (b) *Presumption of*, p. 721.

II. ON PRESCRIPTIVE RIGHTS TO.

- (a) *Subjects of*, p. 721.
- (b) *Presumption of*, p. 721.
- (c) *On rebuilding the church*, p. 721.

III. ON THE ACTION FOR DISTURBANCE OF.

- (a) *Form of*, p. 721.
- (b) *Declaration in*, p. 721.

I. FACULTY FOR.

(a) *Nature of the right thereby conferred.*

It seems that there can be no title to a pew under a faculty, unless as annexed to a house in the parish; which it may be now, by a faculty as well as by prescription, since that supposes a faculty. Even allowing that a faculty in gross is valid, the privilege it confers is personal to the

grantee, and incommunicable to others, whether strangers or his representatives; consequently, a faculty to a man and his heirs, will expire with him. *Stocks v. Booth*, 1 T. R. 428.

(b) *Presumption of.*

It seems that if a pew is claimed, not as appurtenant to a messuage, but in gross, (supposing that it may be so claimed) the faculty granting it must be produced, and its existence, though after a possession of sixty years, will not be presumed. *Stocks v. Booth*, 1 T. R. 428.

II. ON PRESCRIPTIVE RIGHTS TO.

(a) *Subjects of.*

A pew in the aisle of a church may be prescribed for as appurtenant to a house out of the parish.—*Quære* as to a pew in the body of the church? *Davis v. Witts*, Eorest. 14.

(b) *Presumption of.*

After thirty-six years enjoyment of a pew in an antient church, as appurtenant to an antient messuage, a prescriptive right will be presumed, though it be proved that for two years before the first occupation, the pew was unappropriated and considered common; since the party must be supposed to have taken, or been put into possession under an immemorial right. *Rogers v. Brooks*, 1 T. R. 431, n.

(c) *On rebuilding the church.*

If a church is pulled down and rebuilt, the prescriptive rights to pews are appurtenant as before. *Rogers v. Brooks*, 1 T. R. 431, n. (a).

III. ON THE ACTION FOR DISTURBANCE. OF.

(a) *Form of.*

Trespass will not lie for entering a pew; because the plaintiff has not exclusive possession, the possession of the church being in the parson. *Stocks v. Booth*, 1 T. R. 430.

(b) *Declaration in.*

1. In a declaration against a stranger for disturbing a pew, it is not necessary to set forth so strict a title as in actions against the ordinary. *Stocks v. Booth*, 1 T. R. 430.

2. If in case for disturbing a pew the plaintiff rely upon a prescriptive title, the defendant will succeed by proving that the pew originated within time of memory. *Griffith v. Mathews*, 5 T. R. 296.

PHYSICIAN.

I. RELATIVE TO THE COLLEGE OF PHYSICIANS.

(a) *Construction of statutes relative to*, p. 721.

II. RELATIVE TO THE FEES OF.

(a) *Remedy for*, p. 721.

I. RELATIVE TO THE COLLEGE OF PHYSICIANS.

(a) *Construction of statutes relative to.*

1. Candidates to be admitted of the college are to be examined by the *com. min.* then proposed to the *com. maj.* and elected by them, before they can claim to be admitted. *Rex v. Askew*, 4 Burr. 2186.

2. A doctor of medicine, licensed by the college of physicians to practice in London and seven miles round, cannot compel the college to examine him that he may be admitted a fellow. *Rex v. The President and College of Physicians*, 7 T. R. 282.

II. RELATIVE TO THE FEES OF.

(a) *Remedy for.*

The fees of a physician are honorary, and not demandable of right; therefore an action does not lie for them. *Chorley v. Bolcot*, 4 T. R. 317.

PILOT.

I. WHAT VESSELS ARE BOUND TO RECEIVE A PILOT.

(a) *In navigating the Thames*, p. 722.

(b) *Coasting vessels*, p. 722.

II. OF THE MASTER'S LIABILITY FOR THE PILOT'S MISCONDUCT.

(a) *Under the general Pilot Act*, p. 722.

(b) *Under the Liverpool Pilot Act*, p. 722.

III. OF THE PILOT ACTS.

- (a) *Extent of the general Pilot Act*, p. 722.
- (b) *Relative to penalties under.*
 - (b 1) *For acting as a pilot*, p. 723.
 - (b 2) *For refusing to receive a pilot; preliminaries to entitle to*, p. 723.
 - (b 3) *For refusing to receive a pilot; how calculated*, p. 723.

I. WHAT VESSELS ARE BOUND TO RECEIVE A PILOT.

(a) *In navigating the Thames.*

1. The stat. 5 Geo. II, c. 20, which inflicts a penalty on any one piloting a vessel down the Thames, &c. other than a person authorized by the Trinity House, only relates to ships going down the Thames, in the course of their navigation on foreign voyages. *Rex v. Lambe*, 5 T. R. 76.

2. A regular pilot is only requisite, under stat. 5 Geo. II, c. 20. when the vessel is going up or down the Thames, in the course of her voyage. *Rex v. Neale*, 8 T. R. 241.

(b) *Coasting vessels.*

Coasting vessels are not within the 52 Geo. III, c. 39, or compellable to take a pilot on board, on entering rivers within the limits of a jurisdiction having authority to appoint and license pilots; and the exemption in the act is not confined to coasters using the navigation of the river Thames alone. *Usher*, q. t. v. *Lyon*, 2 Price, 113.

II. OF THE MASTER'S LIABILITY FOR THE PILOT'S MISCONDUCT.

(a) *Under the general Pilot Act.*

1. The relation of master and servant does not subsist between the owner of a ship and a pilot taken on board under the general Pilot Act, since the owner was compelled to receive him. Hence, the owner cannot be a sufferer with respect to the underwriter or otherwise, for his misconduct. *Carruthers v. Sydebotham*, 4 M. & S. 77.

2. The master is answerable for the negligence of his crew, though committed

under the directions of a pilot, who for the time supersedes him in the government of the ship. *Boucher v. Noidstrom*, 1 Taunt. 568.

3. An action cannot be maintained against the master of a vessel for running down a ship, while, in pursuance of the Pilot Act, he has a pilot on board, no positive default in the master being proved. *Benett v. Moita*, 7 Taunt. 258; 1 Moore, 4.

4. The 30th sect. of the 52d Geo. III, c. 39, (commonly, but improperly, called the general Pilot Act,) discharging masters and owners of vessels having pilots on board, from responsibility for damages occasioned by the neglect of the pilot,—held, not to apply to vessels having on board pilots appointed for other places than those expressly named in the preamble or provisions of the act. *Attorney General v. Case*, 3 Price, 302.

5. The clause in the Pilot Act exempting masters from liability for damage occasioned by the pilot's misconduct, is not confined to damage to the piloted ship and cargo. *Ritchie v. Bowfield*, 7 Taunt. 309.

(b) *Under the Liverpool Pilot Act.*

1. The ship-owner taking in a pilot pursuant to the Liverpool Local Pilot Act, is liable for injuries occasioned by his negligence. *Attorney General v. Case*, 3 Price, 302.

2. The owners of a merchant vessel running foul of and damaging a king's ship laying in the Mersey, by misconduct of the persons on board, are liable in an information for damages in the nature of an action on the case; although she had on board at the time of the accident, a pilot duly licensed; because the Liverpool local Pilot Act is not of itself, or by reference to the 52 Geo. III, c. 39, imperative, compulsory, or penal, in the captain, to take a pilot on board whilst lying at anchor, but merely subjects him to the payment of the pilot's regulated allowance on refusal. *Attorney General v. Case*, 3 Price, 302. But see III. (a) *infra*.

III. OF THE PILOT ACTS.

(a) *Extent of the general Pilot Act.*

The provisions of the general Pilot Act extend to pilots appointed for limited districts; thus, to those appointed under the Liverpool Pilot Act. *Carruthers v. Sydebotham*, 4 M. & S. 77. But see (b) *supra*.

PILOT.

(b) *Relative to penalties under.*

(b 1) *For acting as a pilot.*

1. Every person who takes upon himself to pilot ships before being examined, approved, and admitted into the fellowship of the pilots of the Trinity House, incurs the penalties of 3 Geo. I, c. 13. *Kimber v. Blanchard*, 2 Blk. 690; 5 Burr. 2602.

2. A master or owner not being a regular pilot, may not pilot his own vessel up the Thames. *Kimber v. Blanchard*, 2 Blk. 690; 5 Burr. 2602.

(b 2) *For refusing to receive a pilot,—preliminaries to entitle to.*

Semble, a forfeiture under the 52 Geo. III, c. 39, s. 34, for refusing to receive a pilot on board, is not incurred, unless the pilot produces his license on demanding admission. *Usher, q. t. v. Lyon*, 2 Price, 118.

(b 3) *For refusing to receive a pilot,—how calculated.*

The penalties imposed by st. 52 Geo. III, c. 39, s. 11, on ships neglecting to take in a pilot on arriving off Dungeness, are to be calculated on ships bound for the river, not on the pilotage due from Dungeness to the Downs, but on that which would be due on the ship's arrival at her ultimate place of destination in the river. *Mackie v. London*, 1 Mars. 585; 6 Taunt. 256.

PLEADING.

INTRODUCTION.

THE Divisions of a subject are Principal, and Subordinate. The Principal Divisions are obtained by resolving the subject into its Constituent parts; the Subordinate, by considering these parts in relation to their Matter, the Matter in relation to its Form. And, if we subjoin to the Principal Divisions, the doctrine of their Properties, Use, and Application; hence the Divisions of this Head.

First.

[A] *Preliminary.*

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Secondly.

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First.

[A] Preliminary.

I. THAT EVIDENCE IS NOT THE SUBJECT OF AVERMENT.

The evidence by which an averment is to be proved, need not be stated in pleading. *Pasley v. Freeman*, 3 T. R. 60.

II. THAT MATTERS OF PRACTICE MAY BE PLEADED.

Legal rights depending upon rules of practice, may be asserted in pleading. *Dudlow v. Watchorn*, 16 East, 39.

Secondly.

[B] Pleading considered, with reference to its Constituent Parts.

I. ON THE DIVISION OF PLEADING INTO ITS CONSTITUENT PARTS.

(a) Relative to pleas in bar.

(a 1) Distinguished from pleas in abatement.

1. A plea to an action by several, shewing that one has no right to sue, is in bar; thus, the bankruptcy of one. *Eckhardt v. Wilson*, 8 T. R. 140.

2. A plea that one of several plaintiffs is liable on the contract jointly with the defendant, is in bar. *Mainwaring v. Newman*, 2 B. & P. 120; *Moffatt v. Van Millingen*, Id. 124, n.

(a 2) Plea in justification defined.

Justification is a conclusion of law, which necessarily results from a given state of facts. *Sutton v. Johnstone*, 1 T. R. 507, 784.

II. ON THE PROPERTIES, USE, AND APPLICATION OF THE CONSTITUENT PARTS OF PLEADING; AND FIRST, IN GENERAL.

(a) *Of entirety in pleading.*

The rule of pleading, that a plea or replication bad in part is bad in whole, does not apply where the part which is defective is surplusage; as where in a replication to debt on bond, a breach is assigned in the nonpayment of two sums, to one only of which the plaintiff is entitled. *Duffield v. Scott*, 3 T. R. 374.

(b) *Of several counts.*

(b 1) *When allowable,—and first, in an action for work and labour.*

Where there are counts for work and labour generally, and likewise specifying the character in which it was performed, the latter will be struck out on motion. *Meeke v. Oxlade*, 1 N. R. 289.

(b 2) *When allowable,—secondly, in an action upon cash notes.*

Where there is a count on each of several notes of a banker, payable to bearer, the court will not strike them out as superfluous, and put the plaintiff to the inconvenience of proving the consideration on the count for money had and received. *Lane v. Smith*, 3 Smith, 113.

(b 3) *When allowable,—lastly, on amendment after demurrer.*

Where the plaintiff, having obtained leave to amend a count in his declaration demurred to, adds new counts which contain no new cause of action, but only vary the manner of stating that which was demurred to, the court will not order them to be struck out. *Brown v. Crump*, 1 Marshall, 609; 6 Taunt. 300.

(b 4) *Individuality of each count.*

Each count of a declaration must be considered as a distinct cause, notwithstanding it be obvious from the averments that the causes are the same. *Raymond v. Bridges*, Loft. 69.

(c) *Of several pleas.*

(c 1) *Whether pleadable by right or favour.*

It is in the discretion of the court whether they will allow several pleas to be pleaded. *Jenkins v. Edwards* 5 T. R. 97.

(c 2) *Whether pleadable in suits by the king.*

The statute 4 Anne, c. 16, s. 4, giving power to plead several matters, does not extend to actions at the suit of the king. *Rex v. Caldwell*, Forrest. 57.

(c 3) *What pleas may or may not be joined,—general rules.*

1. In *assumpsit*, the court will not allow a special plea impeaching the consideration of the contract to be pleaded with the general issue; as that the promise was made on a stock-jobbing transaction. *Shaw v. Everett*, 1 B. & P. 222.

2. Leave to plead two pleas in an action on a deed made abroad, one whereof denies, and the other admits the contract, will be refused. *Laughton v. Ritchie*, 3 Taunt. 385.

(c 4) *Non-assumpsit and tender.*

Non-assumpsit to the whole, and a tender to part, cannot be pleaded. *Dowgall v. Bowman*, 3 Wils. 145; 2 Blk. 723.

(c 5) *Non assumpsit and alien enmity.*

Non-assumpsit and alien enmity cannot be joined. *Feron v. Ladd*, 2 Blk. 1326; *Angerstein v. Vaughan*, 1 B. & P. 222, n; *Thyatt v. Young*, 2 B. & P. 72.

(c 6) *Non est factum and tender.*

Non est factum, and tender either of the whole or a part, cannot be pleaded to debt on bond. *Jenkins v. Edwards*, 5 T. R. 97; *Orgill v. Kemshead*, 4 Taunt. 459.

(c 7) *Non est factum, and usury.*

Non est factum, and usury, may be pleaded together. *Lechmere v. Rice*, 2 B. & P. 12.

(c 8) *Solvit post diem, and insolvency.*

Solvit post diem, and a discharge under an insolvent act, not allowed to be joined, being inconsistent. *Arnold v. Baas*, 2 Blk. 993.

(c 9) *Individuality of each.*

Separate pleas are as distinct and unconnected as if upon separate records. So that the insufficiency of one cannot be supplied by another. *Kirk v. Nowill* 1 T. R. 118.

(c 10) *Leave,—how obtained in C. B.*

In the C. R. several pleas cannot be pleaded without the special leave of the court. *Rawlinson v. Shaw*, 3 T. R. 560.

(d) *Of the demurrer.*

(d 1) *Is a confession of the facts pleaded.*

A demurrer admits the existence of those facts only, which are properly pleaded. *Nowlan v. Geddes*, 1 East, 634; *Gundry v. Feltham*, 1 T. R. 334.

(d 2) *When allowable,—in the case of discontinuance.*

A discontinuance is a ground of demurrer. *Tippet v. May*, 1 B. & P. 411.

(d 3) *When not allowable,—where the error is surplusage,—what is surplusage.*

1. That which in pleading may be rejected as surplusage, will not vitiate; and that is surplusage whose statement, whether in a general or a circumstantial way, is quite unnecessary to the point in question. *Hoar v. Mill*, 4 M. & S. 470.

2. If in an action upon a contract, a breach be assigned, and then a consequence be alleged as resulting from the defendant's omission, it may be rejected as surplusage, since the breach, and therefore the cause of action, is complete without it. *Brandling v. Kent*, 1 T. R. 60.

(d 4) *What is not surplusage.*

1. A material allegation, which is sensible and consistent in the place where it occurs, and which is not inconsistent with any antecedent matter, cannot be rejected merely because it is inconsistent with a subsequent material averment. *Rex v. Stevens*, 5 East, 244; 1 Smith, 437.

2. A material allegation, though laid under a *scilicet*, cannot be rejected for the sake of a subsequent material allegation which is inconsistent with it. *Rex v. Stevens*, 5 East, 244; 1 Smith, 437.

(d 5) *When unnecessary,—in the cases of,*
1. *An immaterial traverse:—2. An impertinent allegation:—3. A sham plea:—4. 5. A plea not issuable.*

1. Where a traverse is immaterial, the adverse party need not therefore demur, but may traverse the inducement. *Thrale v. The Bishop of London*, 1 H. B. 376; *Richardson v. Corporation of Oxford*, 2 H. B. 182.

2. Impertinent allegations will be struck

out on motion, and costs allowed. *Bristow v. Wright*, Dougl. 667.

3. A defective plea, on the face of it pleaded for delay, may be treated as a nullity. *Hopgood v. Wright*, 2 N. R. 188. Thus, a sham plea of judgment recovered in a court of Piepoudre. *Blewett v. Marsden*, 10 East, 237.

4. If a defendant, under terms of pleading issuably, put in a plea which does not go to the merits, it will be set aside on motion. *Stadholme v. Hodgson*, 2 T. R. 390.

5. If a defendant, under terms of pleading issuably, plead several pleas, all of which are issuable but one, that one vitiates the rest, so that judgment may be signed. *Waterfall v. Glade*, 3 T. R. 305.

(d 6) *When necessary,—in the cases of,*
1. *An insensible plea:—2. Duplicity in pleading:—3. A plea puis darreign continuance.*

1. The court will not quash an insensible plea. *Thomas v. Smithies*, 4 Taunt. 668.

2. The only mode of objecting to a plea, single in its form, but bad on the ground of duplicity, is by demurrer. *Griffiths v. Eyles*, 1 B. & P. 413.

3. The court are bound, without any discretion, to receive a plea *puis darreign* continuance; therefore, if the plaintiff objects to it, he must demur, and not move to set it aside. *Lovell v. Eastaff*, 3 T. R. 554.

(d 7) *The consequences of neglecting to demur,—and first, in relation to a demurrer in a subsequent stage.*

1. On demurrer to a defective replication, if the plea itself be bad, judgment shall be given for the plaintiff. *Anon.* 2 Wils. 150.

2. On demurrer to the replication for a discontinuance, the defendant must have judgment, though his plea is bad. *Tippet v. May*, 1 B. & P. 411.

(d 8) *The consequences of neglecting to demur,—secondly, in relation to the healing operation of a verdict:—1 to 5. General rules:—6. Misjoinder of counts:—7. Discontinuance:—8. Omission, or defective statement of consideration:—9. Action by the reversioner:—10. Plea of prescriptive right.*

1. A verdict will aid an ambiguity of expression, but not the omission of the

gist of the action. *Avery v. Hoole*, Cowp. 825.

2. After a verdict, those facts alone can be presumed to have been proved, which either are expressly or impliedly alleged. *Spieres v. Parker*, 1 T. R. 141.

3. After a verdict, the presumption is, that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury. *Jokstone v. Sutton*, in error, 1 T. R. 545, 704.

4. After verdict, every thing shall be intended to have been proved which the allegations of the record require to be proved; but nothing more. *Nerot v. Wallace*, 3 T. R. 25, 26; *Weston v. Mason*, 3 Burr. 1725.

5. A verdict will cure a defect in the mode of stating a title, but not one in the title itself. *Bishop v. Hayward*, 4 T. R. 470; *Small, d. Baker, v. Cole*, 2 Burr. 1159; Dougl. 683.

6. If counts are misjoined, thus, six in tort, and four in *assumpsit*, and the verdict be taken on those counts only which are well joined, the fault is cured, nor will the judgment be arrested. *Kightly v. Birch*, 2 M. & S. 533, over-ruling *Bage v. Bromuel*, 3 Lev. 99.

7. A discontinuance by the defendant as to part of the demand, is aided by verdict. *Harcey v. Richards*, 1 H. B. 644.

8. After a verdict, consideration will be presumed, either the same as laid, or a good one. Lofft. 465. But here, held, with some hesitation, that the uncertainty in a declaration for non-delivery of an article sold, stating the consideration to have been a certain quantity of oil, and the thing sold a certain horse, and without adding the price, was cured by verdict. *Ward v. Harris*, 2 B. & P. 265.

9. If in an action by the reversioner, the injury be so described as that proof of an injury to the possession would entitle him to a verdict, judgment will, after verdict, be arrested. *Jackson v. Peaked*, 1 M. & S. 234.

10. A plea, claiming a prescriptive right, as appurtenant to land, stating that the owners in fee of the land, &c. have been used and accustomed, and of right, ought, &c. not adding,—from time immemorial, upon which issue is taken and found for the claimant, is aided, since without proof of immemorial usage he could

not have succeeded. *Clark v. King*, 3 T. R. 147.

(d 9) *The consequences of neglecting to demur,—lastly, of a replader.*

A replader will only be granted, that justice may be done. *Symmers v. The King*, Cowp. 510.

(e) *Of oyer.*

(e 1) *Whether demandable of a record.*

Oyer cannot now be craved of a record, for example, letters patent, though pleaded with a profert in *curid*. Formerly the practice was otherwise. *Rex v. Amery*, 1 T. R. 149.

(e 2) *When demandable in point of time.*

1. The defendant cannot demand oyer of an instrument proffered by the declaration, in a term subsequent to that in which the plea was filed. *Rex v. Amery*, 1 T. R. 149.

2. Oyer is demandable any time before the twenty-four hours after the demand of a plea are out, though the rule to plead has expired. *Sparkes v. Simpson*, 2 B. & P. 379.

(e 3) *What considered as.*

1. If a party undertake to set out a deed on oyer, he must set forth the whole of it, recital and all; if he omit any part, either the court will quash the plea, or the other side may sign judgment. *Wallace v. The Duchess of Cumberland*, 4 T. R. 371.

2. If a deed is pleaded with a profert, the other side is entitled to oyer; if, therefore, it has been pleaded so by mistake, the pleading must be amended, it being a general rule that leave will not be granted that the production of a copy shall be oyer. *Totty v. Nesbitt*; *Matison v. Atkinson*; 3 T. R. 183, n. (c).

(e 4) *Legal effect of.*

If oyer is granted of any instrument or record, and it is set forth, although the party was not entitled to such oyer, yet he shall be thereby entitled to take the whole instrument as part of his adversary's plea. *Jeffery v. White*, Dougl. 476.

(f) *Of aid prayer.*

(f 1) *Whether demandable after imparlance.*

Aid prayer cannot be pleaded after a general imparlance. *Onslow v. Smith*, 2 B. & P. 364.

(g) *Of pleas puis darreign continuance.*

(g 1) *When allowable, and whether of right.*
A plea *puis darreign* continuance may be pleaded at any time after the last continuance, either in bank or at N. P., and it is imperative on the judge at N. P. to receive it. *Prince v. Nicholson*, 1 Mars. 70; 5 Taunt. 333, 665; 6 Taunt. 45.

(g 2) *Mode of objecting to.*

The plaintiff cannot object at N. P. that a plea *puis darreign* continuance is such a one as ought not to be received. *Prince v. Nicholson*, 1 Mars. 70; 5 Taunt. 333, 665; 6 Taunt. 45.

(h) *Of a new assignment.*

(h 1) *When allowable or not.*

1. There can only be a new assignment where there is a special plea. *Smith v. Milles*, 1 T. R. 479.

2. Where the plea has completely answered, and is fitted to every item of the complaint, the plaintiff cannot, after replying to the defence, newly assign. *Cheasley v. Barnes*, 10 East, 73.

(h 2) *When unnecessary.*

The use of a second count is to avoid the necessity of a new assignment, though it does not in all cases supersede it. *Smith v. Milles*, 1 T. R. 479.

(h 3) *Legal effect of, where there are two counts.*

1. If a declaration contains two counts, to one of which the general issue is pleaded, and to the other a special plea, to which there is a new assignment, the plaintiff cannot, on failing in the proof of his new assignment, give the cause thereby intended in evidence under the second count. *Atkinson v. Matteson*, 2 T. R. 172.

2. A plaintiff, by new assigning to a special plea, admits that he does not go for the cause therein specified; so that he cannot give that cause in evidence under a second count to which the general issue is pleaded. *Atkinson v. Matteson*, 2 T. R. 172.

(i) *Of a nolle prosequi.*

(i 1) *When allowable,—as to a co-defendant.*

If in an action upon a contract against two, one pleads *non assumpsit* and bankruptcy, and the plaintiff thereupon enters a *nolle prosequi* "as to the several matters

pleaded by him," he may proceed against the other. The argument *à contra* was, that the *nolle prosequi* confessed that the bankrupt "*non assumpsit*." *Moravia v. Hunter*, 2 M. & S. 444.

(i 2) *When allowable on a demurrer.*

If the defendant demurs, not for a misjoinder, but for a defect in any of the counts, the plaintiff, as to these, may enter a *nolle prosequi*. *Milliken v. Fox*, 1 B. & P. 157; *Bertram v. Gordon*, 2 Mars. 144; 6 Taunt. 444.

(i 3) *When not allowable on a demurrer.*

On a demurrer for a misjoinder, the plaintiff cannot enter a *nolle prosequi* as to one set of counts. *Drummond v. Dorant*, 4 T. R. 360; *Rose v. Bowler*, 1 H. Bl. 108.

(k) *Of consuance.*

(k 1) *When demandable in point of time.*

Consuance must be claimed in the first instance, or at the first day. *Rex v. Agar*, 5 Burr. 2820.

III. ON THE PROPERTIES, USE, AND APPLICATION OF THE CONSTITUENT PARTS OF PLEADING,— SECONDLY, IN PARTICULAR INSTANCES.

(a) *Of the replication de injuriâ.*

The replication *de injuriâ* is only allowed where an excuse is offered for personal injuries; and not even then, if the excuse relates to any interest in land, or is founded on a commandment. *Jones v. Kitchen*, 1 B. & P. 76.

Thirdly.

[C] *The Constituent Parts of Pleading considered, with reference to Matter.*

I. RELATIVE TO THE TITLE OF THE TERM.

(a) *In relation to the declaration.*

1. A declaration should always be entitled, because it should always be delivered, of the term in which the writ is returnable. The plaintiff, therefore, has no right to recover for a cause accrued later than that term, and to prevent this, if the declaration is entitled later, the court will alter it. *Smith v. Muller*, 3 T. R. 624.

2. In K. B. a declaration may be entitled of the term in which it is filed or

delivered. *Coutanche v. Le Ruez*, 1 East, 133.

3. If the declaration be not entitled of the term in which the writ is returnable, or of that of appearance, it is irregular; and judgment cannot be signed for want of a plea thereto. *Topping v. Fuge*, 1 Mars. 341; 5 Taunt. 330.

4. A declaration entitled generally has relation to the first day of term. It may be entitled generally, though the cause of action is stated as having arisen on the first day; since, with reference to the antient proceedings *ore tenus*, a declaration is not supposed to be delivered before the court have taken their seat, before which time, and on the same day, the cause might have arisen. *Pugh v. Robinson*, 1 T. R. 116.

(b) *In relation to the plea.*

1. The court will oblige a defendant to entitle his plea as of the day on which it is filed, instead of the term generally, only where injustice would otherwise ensue, or where he has foregone the privilege of pleading it by unnecessary delay; not, therefore, where he files a plea *puis darrein* continuance after the day in bank of a matter which has arisen between the verdict and that day, but which plea he did not file sooner because a rule for a new trial was depending, which, had it been granted, the plea would have been unnecessary. *Lovell v. Eastaff*, 3 T. R. 554.

2. A defendant must plead as of the term when he ought to have appeared, according to the exigency of the writ with which he has been served. *Smith v. Muller*, 3 T. R. 627.

II. RELATIVE TO THE COMMENCEMENT.

(a) *In relation to the declaration.*

(a 1) *Must correspond with the number of plaintiffs.*

The declaration must agree with the process in the number of plaintiffs. *Rogers v. Jenkins*, 1 B. & P. 383.

(a 2) *Whether must correspond with the number of defendants.*

1. The rule, that on joint bailable process, the declaration must be joint against all, is without an exception. *Thompson v. Cotter*, 1 M. & S. 55; *Spencer v. Scott*, 1 B. & P. 19; *Stables v. Ashley*, Id. 49;

though the writ and affidavit describe the cause of action to be several as well as joint. *Lewin v. Smith*, 4 East, 589; 1 Smith, 285; and the declaration will be set aside if not against all, though it has been taken out of the office by those against whom it was filed. *Chapman v. Eland*, 2 N. R. 82; and not merely an *exoneretur* entered as to the bail, *Moss v. Birch*, 5 T. R. 722. But in process *not bailable*, the plaintiff may declare separately against each defendant, *Ibid*, and *Roe v. Cock*, 2 T. R. 257; and the insertion in the process of the name of one not named in the affidavit of debt, does not make the declaration against the other defendant alone irregular. *Forbes v. Phillips*, 2 N. R. 98. But where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the court will set aside the declaration and subsequent proceedings. *Jonge v. Murray*, 1 Mars. 274. In bailable process, however, against two, with *ut etiam* against one, the plaintiff may declare against the latter solely, though the sheriff arrest both. *Kervel v. Fossett*, 7 Taunt. 458; 1 Moore, 147.

2. See BAIL.

(a 3) *Whether must correspond with the character in which, &c.*

The plaintiff may declare *qui tam* on general process. *Lloyd v. Williams*, 3 Wils. 141; 2 Blk. 722. But it is irregular to declare in one's own right on process *qui tam*. *Canning v. Davis*, 4 Burr. 2417.

(a 4) *Whether must correspond with the nature of the action.*

Even where the proceedings are by bill, a variance between the writ and declaration in the nature of the action, or right in which the plaintiff is suing, is a ground for setting the proceedings aside. *Turing v. Jones*, 5 T. R. 402.

(a 5) *Of the averment "and thereupon," &c.*

The omission of the words in a declaration by original, "and thereupon the plaintiff complains," is so far informal, that, although the defendant cannot therefore demur, the court will compel their insertion. *Dobson v. Herne*, 1 B. & P. 366.

(b) *In relation to the plea.*

(b 1) *Its influence on the body.*

1. The extent and meaning of a special

plea is to be collected from the introduction. *Smith v. Edge*, 6 T. R. 565.

2. If the general issue and a special plea be pleaded, and the latter commencing as an answer to part only of the demand, answers the whole, it is bad on special demurrer. *Gray v. Pindar*, 2 B. & P. 427.

III. RELATIVE TO THE AVERMENTS OF TIME AND PLACE.

(a) *In relation to negative averments.*

A negative averment need not be alleged with time and place. *Rea v. Hollond*, 5 T. R. 607.

IV. RELATIVE TO THE CONCLUSION.

(a) *Whether to the country or bishop in the case of a marriage abroad.*

Where a marriage has been solemnized abroad, so that the court cannot send a writ to any bishop, the lawfulness of the marriage must of necessity be tried by a jury, and therefore the replication of *ne unques accouple* must conclude to the country. *Ilderton v. Ilderton*, 2 H. B. 145.

(b) *Whether with a verification or to the country.*

(b 1) *General rules.*

Where a replication denies the whole substance of the defendant's plea, the plaintiff may tender issue and conclude to the country. But where he selects one out of several facts, he may traverse that one and conclude with a verification. To the first branch of the rule there are exceptions established by usage and precedent. *Hedges v. Sandon*, 2 T. R. 439; Dougl. 430.

(b 2) *When with a verification,—in the cases,—1. Of a replication to a plea of usury.—2. In pleadings in actions on sheriff's bonds:—2. In pleadings in actions against bail.*

1. In an action on a bill of exchange, if there is a plea of an usurious agreement, and that the bill was given in consequence thereof, the plaintiff may formally traverse the usurious agreement, and conclude with a verification. *Smith v. Dovers*, Dougl. 428.

2. If to a plea of performance generally to an action on a sheriff's bond, the plaintiff reply a particular warrant, and

that the defendant ought to have made due return, &c. but neglected, &c. he ought to conclude with a verification. *Sayre v. Minns*, Cowp. 575.

3. A verification is the proper conclusion of the replication to a plea to a *scire facias* against bail,—“that the principal died before the return of any *ca. sa.*,”—when the replication mentions a particular *ca. sa.*, and alleges that he was alive at the return thereof. *Chandler v. Roberts*, Dougl. 58; *Henderson v. Withy*, 2 T. R. 576.

(b 3) *When with either,—in the case of a replication to a plea of gaming.*

A replication to a plea of gaming to debt on bond, that the bond was for money justly due, and not for securing money won at play, may conclude either with a verification or to the country. *Hedges v. Sandon*, 2 T. R. 439.

(c) *Of the prayer of judgment.*

(c 1) *Against the further maintenance, &c.*

1. A plea in the common form, and not against the further maintenance of the suit, goes to the time of action commenced, not of plea pleaded. *Le Bret v. Papillon*, 4 East, 502.

2. A plea, shewing a disability in the plaintiff to sue, or other matter of defence, accrued since action brought, must pray judgment against the further maintenance of the action, and not against maintaining it generally. *Le Bret v. Papillon*, 4 East, 502.

(c 2) *Against a certificated bankrupt, or insolvent.*

A plaintiff, who is only entitled to judgment against the future estate and effects of the defendant,—for instance, a bankrupt or insolvent,—cannot, in pleading, pray judgment generally, but must confine it to the future estate and effects. *Wilson v. Kemp*, 2 M. & S. 549.

V. RELATIVE TO THE PROPERTY.

(a) *When not requisite.*

(a 1) *In pleading a feoffment.*

In pleading a feoffment, if the writing by which it was accompanied, is a deed, no profert need be made. *Read v. Brookman*, 3 T. R. 156.

(a 2) *In pleading a conveyance under the statute of uses.*

In pleading a conveyance under the Statute of Uses, a profert of the deed is unnecessary. *Read v. Brookman*, 3 T. R. 156.

(a 3) *Where the deed is inducement.*

Vide *supra*, 334, XI. (a 2).

(b) *When excused.*

The loss of a deed by time and accident, or by any other casualty, is a sufficient reason for dispensing with a profert in pleading. As is likewise the circumstance that the deed is in the hands of the opposite party, or destroyed by him. *Read v. Brookman*, 3 T. R. 151; *Totty v. Nesbitt*, *Id.* 153, n. (c).

VI. RELATIVE TO THE SUBSCRIPTION.

(a) *In relation to a declaration.*(a 1) *The pledges.*

The omission of pledges at the end of a declaration in K. B. is not demurrable. *Anon.* 3 T. R. 157. See *How v. Denin*, 2 Wils. 142.

(b) *In relation to a plea puis derrein continuance.*(b 1) *The affidavit.*

A plea puis derrein continuance, though no plea in abatement, must be verified by affidavit, whether pleaded at N. P. or in Bank. *Willoughby v. Wilkins*, 2 Smith, 396.

VII. RELATIVE TO THE STATEMENT OF THOSE CIRCUMSTANCES, THE COMBINATION OF WHICH FORMS THE SUBSTANCE OF PLEADING, —AND FIRST, IN RELATION TO THE CONSTITUENT PARTS OF PLEADING COMBINED.

(a) *A statement must be circumstantial,—general rule.*(a 1) *Allegari non debuit quod probatum non relevat.*

In pleading, it is unnecessary to allege what need not be proved. *Rex v. Burks*, 7 T. R. 4.

(a 2) *Prolixity must be avoided.*

The court will censure an unnecessary length of pleading. *Yates v. Carlisle*, 1 Blk. 270.

(a 3) *A generality must be restrained by a particularity.*

Every indictment ought to be so framed

as to convey to the party charged, a certain knowledge of the crime imputed to him. If expressions are used, which leave it in doubt whether all of several facts, or some only are charged against him, subsequent averments must be used defining and tying up this generality. Thus, in an indictment for perjury, or for obtaining money under false pretences, the word "falsely," &c. leaves it in doubt (from its received signification on those occasions) what of the facts alleged are meant to be charged as false, and which, therefore, the defendant must come prepared to deny. The prosecutor therefore, must go on, in order to give the defendant certain notice of the very charge, to separate, by specific averments, all that is meant to be relied on as false. It is true indeed, that the indictment might negative, one by one, every one of the facts, &c. and that that would not vitiate, though some were true. But the law will not suppose that that will be done, if it be in the knowledge of the prosecutor, that some of them are true. An indictment for obtaining money, &c. for want thereof, was held bad on error. *Rex v. Perrott*, 2 M. & S. 379.

(a 4) *A particularity restrains a generality.*

If a party, in pleading, use a generic term, comprizing therefore many species or particulars, and afterwards use an averment, defining which particular or species of the number he insists on, he is tied up to that particular one. (The reason may be, because he leads his adversary to suppose he only means to rely on that, who therefore confines his proof accordingly). *Harris v. Mantle*, 3 T. R. 307; *Rex v. Perrott*, 2 M. & S. 379.

(a 5) *Where the facts lie within the knowledge of both parties.*

If the defendant pleads a fact which lies as much within his own as the plaintiff's knowledge, he must plead it particularly. The plaintiff is aware of the fact, but he cannot know what particular part of it the defendant relies on. *Hill v. Montagu*, 2 M. & S. 378.

(b) *A statement must be circumstantial,—particular instances.*(b 1) *In pleading an estate less than a fee.*

Wherever a particular estate is pleaded, its original must be shewn. *Johns v. Whitley*, 3 Wils. 65.

(b 2) *In pleading a contract.*

A party who pleads a contract, must set it out, if he be a party to the contract. *Hill v. Montagu*, 2 M. & S. 378.

(b 3) *In pleading a non-existing grant.*

In pleading a non-existing grant, all the forms heretofore observed in pleading deeds, except the profert, must be observed. *Hendy v. Stevenson*, 10 East, 55.

(b 4) *In pleading that the memorial of an annuity was insufficient.*

In an action on a bond conditioned for the payment of an annuity, a plea, stating that a memorial of the bond had been enrolled, and after reciting the memorial that it was not a good and sufficient memorial according to the form of the statute; without stating in what particulars it was defective, or alleging that no other memorial had been enrolled, is bad on special demurrer. *Simmons v. Hunt*, 1 Mars. 155.

(b 5) *In pleading privilege of office.*

Plea of privilege for a 60th clerk in chancery ought to allege, that defendant is actually attendant on the office; that being the ground of the privilege. *Goldsmith v. Baynard*, 2 Wils. 228.

(b 6) *In pleading proceedings in courts of limited jurisdiction.*

1. In actions in inferior courts, every thing essential to give the court jurisdiction, must be averred in the declaration; therefore, that the facts which constitute the gist of the action, happened within the jurisdiction; for example, the consideration of the defendant's promise, as well as the promise itself. An omission in this particular is not aided by verdict, since no facts need be proved but what are averred. *Trevor v. Wall*, 1 T. R. 151.

2. Where the judgment of a court, out of the ordinary course of law, and not authorized by a public act of parliament, is pleaded, the nature of its jurisdiction must be shewn. *Unwin v. Wolseley*, 1 T. R. 674.

(b 7) *In pleading a commitment for obstructing judicial proceedings.*

In a plea, justifying a commitment for obstructing judicial proceedings, the means used must be shewn. *Spilsbury v. Mickeithwaite*, 1 Taunt. 146.

(b 8) *In pleading an arrest, on the ground of suspicion.*

A plea, justifying on the ground of suspicion, must detail the circumstances which induced it. *Muir v. Kaye*, 4 Taunt. 34.

(b 9) *In making title under a corporation incorporated anew.*

If a corporation, having been dissolved, is incorporated anew by an original charter, it is unnecessary, in making title under the new charter, to mention the fact of the previous incorporation. *Rex v. Amery*; *Same v. Monk*, 1 T. R. 589.

(b 10) *In pleading an exclusive mode of election under a charter.*

Where the question is, whether a mode of election used under a charter of incorporation, is in exclusion of any other; to plead the bare usage is not sufficient, without negating the right of election in any other way. *Rex v. Bellringer*, 4 T. R. 810.

(b 11) *In actions for foreign money.*

In an action for the non-payment of foreign money, it is necessary to shew the value in English money. *Rex v. Holland*, 5 T. R. 607.

(b 12) *In an information for smuggling.*

An information, stating a vessel to have been within four leagues of the coast, "having on board Geneva, liable to forfeiture on being imported into this kingdom," is bad for the uncertainty, the Geneva being permitted to be imported, unless under certain restrictions, which ought, therefore, to have been set forth, and the case brought within them. *The Attorney General v. Lemerchant*, 1 Anst. 52.

(c) *A statement must be circumstantial,—lastly, exceptions to the general rule.*(c 1) *Of facts which the court will notice ex officio,—privilege of peerage.*

Privilege of peerage will be noticed without pleading. *Lofft*. 49.

(c 2) *In relation to an estoppel,—general maxim.*

A party need not aver any thing in pleading which his adversary is estopped from denying. *Wilson v. Hobday*, 4 M. & S. 125.

- (c 3) *In relation to an estoppel,—where the truth appears.*

An estoppel is only conclusive until the truth appear; a party, therefore, cannot rely on an estoppel, who upon the face of the pleadings has confessed the truth. *Ludford v. Barber*, 1 T. R. 86.

- (c 4) *Of facts, whose existence or negation will be presumed,—and first, where the knowledge lies wholly with the adverse party.*

In pleading, if the knowledge of a state of things, which, if existing, favour one party, lies rather with him than his adversary, their non-existence will be presumed, until he avers that they do exist. *Wilson v. Hobday*, 4 M. & S. 120.

- (c 5) *Secondly, where the adverse party has admitted their existence or negation.*

In pleading, if the one party has, by his conduct, admitted the existence of a particular state of things necessary to the support of his adversary's claim or defence, and it also lies peculiarly in the knowledge of such party, rather than his adversary, whether or not they do exist, their existence will be taken for granted, until he avers to the contrary. *Wilson v. Hobday*, 4 M. & S. 120.

- (c 6) *Thirdly, in suits against ecclesiastics.*

The presumptions are, that every man conforms to the law. Therefore, ecclesiastics need not prove that they have read the thirty-nine articles, or the like, until a presumption to the contrary has been raised. *Powel v. Milbank*, 2 Blk. 851.

- (c 7) *Fourthly, in suit for defaming a candidate for a seat in parliament.*

In a declaration for defaming a candidate to serve in parliament, the writ heed not be stated. *Harwood v. Astley*, 1 N. R. 47.

- (c 8) *Fifthly, in an action upon a charter-party.*

Covenant on a charter-party, by the owner against the freighter. The covenants on the defendant's parts were, that they should load a full cargo. No claim for short tonnage was to be admitted, or allowance made for the same by the defendant, unless certified by defendant's

president, &c. which president should give, if reasonably demanded, "and also unless such short tonnage be made to appear, on arrival in the Thames, by the survey of four shipwrights." The defendants' president refused to certify a deficiency which was averred to exist. Motion in arrest of judgment, for not averring such survey, had been made, &c. Judgment for the plaintiff. For by averring a request and refusal by the company's president to grant a certificate, and having thus shewn that it was impossible, through the default and neglect of those persons, to perform that which may be assumed to be a condition precedent, that was equal to performance. That thus a right of action for compensation for short tonnage being once vested in the plaintiff, it could only be divested by a subsequent non-feasance, namely, neglecting to procure a survey; and if the fact was so, it was for the defendant to plead it. It was a circumstance which was to defeat the plaintiff's right of action once vested, and was therefore in its nature matter of defence. *Hotham v. The East India Company*, 1 T. R. 638.

- (c 9) *Sixthly, in an action upon a bail bond.*

On demurrer to a declaration on a bail bond, for a contempt, the court will not presume the plaintiff had no authority to take bail; but some case must be made upon the pleadings. *Say v. Ellis*, 2 Blk. 955.

- (c 10) *Lastly, in an action against a bailee, for the consequences of a want of qualification.*

Where a bailee undertakes to procure a qualification, without which the property would be liable to seizure, if afterwards seized, as for want of qualification, the proof that he was qualified lies upon the bailee; and it is sufficient, in an action against him for the loss, to aver generally that they were seized as forfeited for the particular cause. *Baker v. Liscoe*, 7 T. R. 171.

- (c 11) *In relation to the case where the facts lie wholly within the knowledge of the adverse party.*

1. Where circumstances be peculiarly within the knowledge of one's adversary, a summary statement is sufficient. *Gale v. Reed*, 8 East, 80.

2. In pleading, where one party throws a charge upon his adversary, he may plead it in general terms, since he cannot be supposed cognizant of the particular nature of it. Hence, in an action for not repairing a private way, which the defendant is bound to repair as owner of an estate, the declaration may state that the defendant was bound by reason of his possession. *Rider v. Smith*, 3 T. R. 766.

(c 12) *In relation to the case where the detail will be prolix.*

1. Where a subject comprehends multiplicity of matters, there to avoid prolixity, generality of pleading is allowed. But if there be any thing specific in the subject, though consisting of a number of acts, they must all be enumerated. *J. Anson v. Stuart*, 1 T. R. 753.

2. Where a matter consists of a multiplicity of circumstances, inasmuch, that to plead it particularly would tend to prolixity, then, for the sake of avoiding inconvenience, general pleading is allowed. Thus, in the case of a plea of fraud and covin. *Hill v. Montague*, 2 M. & S. 378, 379.

(c 13) *In relation to matters in aggravation.*

Matters laid by way of aggravation, may be alleged in general terms. *Chamberlain v. Greenfield*, 3 Wils. 292.

(c 14) *In a declaration for a copyhold fine.*

The declaration in an action for a copyhold fine, may state generally that the defendant was indebted to the plaintiff in such a sum, for a reasonable fine due and payable by him. *Whitehead v. Hunt*, Dougl. 727, n.

(c 15) *In a plea by bail, justifying an entry to search for principal.*

Bail justifying an entry into a house to search for their principal, may allege generally that they duly became bail, and entered into a recognizance, without stating that the principal was delivered to them. *Sheers v. Brooks*, 2 H. B. 120.

(c 16) *Averment that a power was forced into a war.*

An averment that a power was forced to proceed to hostilities, because a treaty

had been broken, is sufficient. *Rex v. Holland*, 5 T. R. 607.

(d) *In relation to repugnancy.*

(d 1) *Repugnancy defined, in a particular instance.*

A replication is repugnant, if it demand the whole sum, and acknowledge satisfaction of part. *Vigers v. Aldrich*, 4 Burr. 2482.

(e) *In relation to subtlety.*

Subtlety in pleading, in order to ensnare the adverse party, is not permitted. *White v. Howard*, 3 Taunt. 339.

(f) *In relation to privacy.*

In pleading, a party who is identified with another, is subjected to the same rules by which that other, had he been the party to the suit, would have been bound. *Wilson v. Hobday*, 4 M. & S. 120.

(g) *In relation to the case where a form is prescribed by statute.*

Scilicet, that if an act of parliament provide that such a form of pleading shall be pursued, the courts will allow no deviation from it. *Rex v. Perrott*, 2 M. & S. 379.

(h) *In relation to departure.*

(h 1) *In proceedings against bail.*

1. If to a plea to a *scire facias* against bail, that no *ca. sa.* was taken out, the plaintiff reply that one was issued, and returned *non est inventus*, and the defendant rejoin that the *ca. sa.* did not lie four days in the sheriff's office, it is a departure from the plea. *Powell v. Taylor*, 4 T. R. 587, n. (b).

2. A plea by bail sued on their recognizance, that no *ca. sa.* was *duly* issued against the principal, is maintained by a rejoinder, shewing that the *ca. sa.* set forth in the replication was issued into an improper county. *Dudlow v. Whatchorn*, 16 East, 39.

(h 2) *In pleadings relative to an annuity.*

If to an action for an annuity the defendant plead that no such memorial was enrolled as is required by the Annuity Act; and the plaintiff reply, setting forth a memorial, which on the face of it is pursuant to the act, a rejoinder denying the truth of a fact alleged by the memorial, and which, if untrue, vitiates it, is a departure

from the plea. *Præd v. The Duchess of Cumberland*, 4 T. R. 585; 2 H. B. 280.

(h3) *In relation to pleadings of judgments confessed in trust.*

A rejoinder, that the judgment was confessed as well for the defendant's own demand, as in trust for other creditors, is a departure from a plea which stated that the sum for which the judgment was confessed was due to the defendant. *Tolputt v. Wells*, 1 M. & S. 395.

VIII. RELATIVE TO THE STATEMENT OF THOSE CIRCUMSTANCES, THE COMBINATION OF WHICH FORMS THE SUBSTANCE OF PLEADING.—SECONDLY, IN RELATION TO THE CONSTITUENT PARTS OF PLEADING IN DETAIL.

(a) *In relation to pleas in general.*

(a 1) *The time ascertained to which the plea must relate.*

A plea goes to the time of action commenced, and not of plea pleaded. Therefore, a plea of set-off that the plaintiff was indebted before and at the time of plea pleaded, is bad. *Evans v. Prosser*, 3 T. R. 186, over-ruling, *comme semble*, *Sullivan v. Montague*, Dougl. 112.

(a 2) *In relation to a previous waiver of matter of defence.*

Where a party, having an opportunity, neglects to rely on a defence, he waives it. *Burton v. Mardin*, 1 T. R. 80. Hence, if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. *Erving v. Peters*, 3 T. R. 689.

(b) *In relation to pleas in justification.*

A plea must admit the facts it professes to justify. *Taylor v. Cole*, 3 T. R. 298.

(c) *In relation to pleas when under terms of pleading issuably.*

(c 1) *General rules.*

1. The rule that where a defendant is under terms of pleading issuably, he cannot put in a plea which does not go to the merits, cannot be dispensed with in any instance. *Stadholme v. Hodgson*, 2 T. R. 390.

2. The term "pleading issuably," in a judge's order, means, not merely a plea on which issue may be taken, but one that goes to the merits, and is not for delay. *Simeon v. Thompson*, 8 T. R. 71.

3. A plea by a defendant under terms of pleading issuably, cannot be treated as a nullity, because defective in its form. *Thellusson v. Smith*, 5 T. R. 152.

4. A plea which is not an answer to the whole declaration, and cannot, from its uncertain form, be applied to any particular part of it, may, when the defendant is under terms of pleading issuably, be treated as a nullity. *Macdonnell v. Macdonnell*, 3 B. & P. 174.

5. Where a defendant, under terms of pleading issuably, pleads non-issuably to any part of the plaintiff's demand, for instance, demurs specially to part, the plaintiff may sign judgment for the whole. *Cuming v. Sharland*, 1 East, 411.

(c 2) *Particular instances of issuable pleas, namely, 1. Plea of tender:—2. Plea of the Statute of Limitations:—3. Pleas by bail of nul tiel record, and no ca. sa.:—4. Plea by bail of a member of parliament of error pending:—5 General demurrer.*

1. A tender is an issuable plea, within the terms of pleading issuably under a judge's order. *Noone v. Smith*, 1 H. B. 369.

2. A defendant, under terms of pleading issuably, may plead the Statute of Limitations. *Rucker v. Hannay*, 3 T. R. 124, over-ruling, as to this matter, *Stadholme v. Hodgson*, 2 T. R. 390.

3. If a defendant in an action on a recognizance of bail under a judge's order to plead issuably, plead, 1. *nul tiel record*; 2. that no *ca. sa.* was sued out against the principal:—such pleas may be considered as issuable. *Hartley v. Hodson*, 1 Moore, 430.

4. A plea by the bail of a member of parliament, under stat. 4 Geo. III, c. 33, that error is pending on the judgment against their principal, is in bar, and is an issuable plea within a judge's order. *Curling v. Innes*, 2 H. B. 372.

5. A demurrer on the merits is an issuable plea within the meaning of an order for time. *Wright v. Russell*, 2 Blk. 923; 3 Wils. 530.

- (c 3) *Particular instances of pleas not issuable, namely, 1. Plea of alien enemy:—2. Sham plea of judgment recovered:—3. Special demurrer.*

1. The plea of alien enemy is not an issuable plea within a judge's order. *Simeon v. Thompson*, 8 T. R. 71.

2. Judgment recovered in another court, if false, is no plea when under terms of pleading issuably. *Cave v. Aaron*, 3 Wils. 33; *Heron v. Heron*, 1 Blk. 576.

3. A special demurrer, though not merely for delay, is not allowed when under terms of pleading issuably. *Bell v. Da Costa*, 2 B. & P. 446. So that if a defendant, under terms of pleading issuably, puts in a special demurrer, the plaintiff may sign judgment. *Berry v. Anderson*, 7 T. R. 530; *Gray v. Ashton*, 3 Burr. 1788.

(d) *In relation to sham pleas.*

It is a high contempt to raise a difficult question of law by a sham plea. *Charles v. Marsden*, 1 Taunt. 224.

(e) *In relation to the issue in fact.*

- (e 1) *Must consist of an affirmative and negative.*

Two affirmatives cannot make an issue. Dougl. 60.

- (e 2) *What allegations are traversable, or issues material,—rule in the case, 1. Where several facts are alleged:—2. Of a formal traverse.*

1. Where two distinct facts are stated, each of which is essential to the party's case, his adversary may traverse either. *Grimwood v. Barrit*, 6 T. R. 462.

2. Whether a formal traverse is material or immaterial, depends upon whether the fact it asserts is essential to support the inducement to the traverse. *Thrale v. The Bishop of London*, 1 H. B. 376.

- (e 3) *What allegations are traversable, or issues material,—example of a material issue, namely, in the case of nil debet in assumpsit.*

Issue joined on *nil debet in assumpsit* on a bill of exchange, is a material issue. *Harvey v. Richards*, 1 H. B. 644. *Vide supra* 326, that such plea may, in the first instance, be considered a nullity.

- (e 4) *What allegations are traversable, or issues material,—examples of immaterial issues, namely, in the cases of the traverse of, 1. A general right presumed by law:—2. A plea of performance:—3. Of reasonable time.*

1. Trespass for fishing in a free and a several fishery. Plea that the *locus in quo* is an arm of the sea in which every subject has a right to fish. Replication claimed an exclusive right, and traversed that every subject had a right to fish in the said arm of the sea. Objected, that the averment upon which the issue was tendered was only a consequence of law resulting from the premises. But held, that the issue was well tendered. *The Corporation of Orford v. Richardson*, 4 T. R. 437; but judgment reversed, 5 T. R. 367; 2 H. B. 182; 1 Anst. 231:—in which it was held, that where a fact is stated from which the law presumes a general right of all the king's subjects, that must be negated by a particular contradictory right. The issue cannot be on the general right. *Richardson v. Mayor of Oxford*, 1 Anst. 231.

2. Issue cannot be taken on a general averment of performance. *Sayre v. Minns*, Cowp. 578.

3. In trespass for breaking and entering the plaintiff's house, and continuing therein from, &c. till the commencement of the suit; the defendant as to the continuing in the house for a part of the time, "to wit, for the space of two days," justifies as sheriff under a *fi. fa.* issued against the goods of T. K. deceased, in the hands of the plaintiff's wife, as administratrix, to be administered; and, that having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in declaration mentioned, the same being a reasonable time in that behalf. The replication alleges that the two days mentioned in the plea were an unreasonable length of time for the defendant's searching for the goods; and then new-assigns. Held, that the replication was bad, as tendering an immaterial issue, and as being double. *Cook v. Birt*, 1 Mars. 333; 5 Taunt. 765.

- (e 5) *Mode of proceeding on an immaterial traverse.*

Where a traverse is immaterial, that

is, when an issue thereon will not determine the question in controversy, the other side may pass it by, and traverse some other point. *Secus*, where material. *The Corporation of Oxford v. Richardson*, 4 T. R. 437.

(e6) *Extent of the issue.*—1. 2. *General rules.*—3. *Of the replication de injurid.*

1. An issue cannot be taken in more extensive terms than those in which it is tendered. *Rex v. Amery*; *Same v. Monk*, 1 T. R. 590.

2. Several facts may be put in issue, if they all make only one point of defence. *Lane v. Chandler*, 3 Smith, 77.

3. The replication *de injurid* puts in issue all the matters, but nothing else contained in the plea. *Sayre v. Lord Rochford*, 2 Blk. 1165; *D'Ayrolles v. Howard*, 3 Burr. 1385.

(e7) *Mode of traversing matter in excuse of a profert.*

If a profert is excused, the matter of excuse is put in issue, either by a specific traverse of the facts, or by pleading *non est factum*. *Read v. Brookman*, 3 T. R. 158.

(f) *In relation to the demurrer, or issue in law.*

(f1) *When the demurrer may be general, —particular instance.*

Plea of judgment recovered in a plea of trespass on the case on promises, to the damage of the defendant, held bad on general demurrer. *Mill v. Pollon*, 7 Taunt. 271; 1 Moore, 19.

(f2) *When the demurrer must be special, —particular instances.*

1. The want of averring time and place, is in every case a ground for special demurrer only. *Bowdell v. Parsons*, 10 East, 359.

2. Where a special request is essential to the case, an averment that the party was requested, is only objectionable as wanting time and place. *Bowdell v. Parsons*, 10 East, 359. In this case it was held, that the want of averring a special request when necessary, is bad on general demurrer, and that the averment "although often requested so to do," is not sufficient. *Back v. Owen*, 5 T. R. 409.

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3. If in covenant for rent, an arrear for such a time is alleged to have fallen on an impossible day, or if no day is mentioned, the objection, if any, is a ground for special demurrer. *Buckley v. Kenyon*, 10 East, 139.

4. In pleading a bargain and sale, the want of averring a consideration, is only a ground for special demurrer. *Bolton v. The Bishop of Carlisle*, 2 H. B. 259.

(f3) *Extent of the demurrer.*

1. A demurrer because more is demanded than the plaintiff is entitled to, must be confined to the excess. *Buckley v. Kenyon*, 10 East, 139.

2. If in *scire facias*, or debt on a judgment, two sums are demanded as adjudged, the one by the original court, the other by the court of error, and the one is alleged with a *prout patet*, the other not, a demurrer for the omission must be confined to the latter sum. *Powdick v. Lyon*, 11 East, 565.

3. A demurrer for the misjoinder of causes accrued in different rights, must be to the whole declaration. *Kingdom v. Nottle*, 1 M. & S. 355.

(g) *In relation to the new assignment.*

(g1) *In an action against two.*

Semble, that if a plaintiff in an action of trespass against two new-assigns a joint trespass by both, he cannot recover against one defendant on the new assignment, by proving an act of trespass by him alone. *Atkinson v. Matteson*, 2 T. R. 172.

(h) *Of substituting one plea for another.*

1. In C. B. a plea may be withdrawn, and another plea substituted on terms. *Free v. Hawkins*, 7 Taunt, 278; 1 Moore, 28.

2. A plea of infancy was substituted for *non est factum*, on an affidavit of misconception of the legal effect of the latter. *Olding v. Arundel*, 1 Blk. 357.

Fourthly.

[D] *The Matter of the Constituent Parts of Pleading, considered with reference to Form.*

I. IN RELATION TO DEGREES OF CERTAINTY.

(a) *The several degrees proposed.*

There are three kinds of certainty,—1. To a certain intent in general:—2. To a com-

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mon intent:—3. To a certain intent in every particular. The last is rejected in all cases, as partaking of too much subtlety; the second is sufficient in defence; the first is required in a charge, *Rex v. Horne*, Cowp. 682.

(b) *Certainty to a certain intent in general, defined.*

Certainty to a certain intent in general, means, what, upon a fair and reasonable construction, may be called certain, without recurring to possible facts. Dougl. 159.

(c) *Certainty to a common intent, when sufficient.*

Certainty to a common intent is sufficient in pleas in bar. Dougl. 158.

(d) *Certainty to a certain intent in general, when sufficient.*

Certainty to a certain intent in general, is all that is requisite in counts, replications, and indictments, and returns to writs of *mandamus* and *habeas corpus*. Dougl. 159.

(e) *Certainty to a certain intent, in every particular, when necessary.*

Certainty to a certain intent in every particular, is necessary in estoppels. Dougl. 159.

(f) *Comparative degrees of certainty between civil and criminal pleadings.*

If there be any difference in point of certainty, required between a civil and a criminal proceeding, the rule holds most strictly with the latter. *Rex v. Marsden*, 4 M. & S. 168.

II. IN RELATION TO TERMS WHICH IMPLY, IN THEIR OWN FORM, THE EXISTENCE, OR NEGATION OF FACTS.

(a) *When allowable.*

1. An averment in pleading need not be in precise terms; if by reference it incorporates what has been said before, it is considered as repeating it over again, where such repetition is essential. *Rex v. Perry*, 6 T. R. 573.

2. A general reference to former parts of the record, without repeating such parts, is only allowable where the reference is to something definite and certain. *Stile v. Nokes*, 7 East, 492.

3. An averment that a fact happened at Fort St. George *aforesaid*, is a sufficient allegation of place, if the situation of the fort has been previously stated, thus, at Westminster, &c. *Rex v. Holland*, 5 T. R. 607.

4. Where forbearance of a debt is stated as the consideration of a promise, though it is not expressly averred, yet if it appear by necessary intendment to whom the forbearance was, it is sufficient after verdict, and perhaps on special demurrer. *Marskall v. Birkenshaw*, 1 N. R. 172.

(b) *Examples of terms which imply as above.*

(b 1) "Tenor."

The word "tenor" implies and binds the party to an exact recital. Dougl. 194.

(b 2) "Purport."

The words, "purporting to be a bank note," in an indictment, mean that the note upon the face of it, appears to be a bank note; and the want of such appearance cannot be supplied by evidence of representations of the party when he disposed of it. *Rex v. Jones*, Dougl. 300.

(b 3) "In manner and form following."

The words "in manner and form following, that is to say," do not bind the party to an exact recital. *Rex v. May*, Dougl. 193.

(b 4) "Aforesaid:" See the Analysis.

(b 5) 1. "To,"—2. "Until," as applied to time.

1. The word *to*, when applied to time, may have either an inclusive or exclusive signification. *Rex v. Stevens*, 5 East, 255. 1 Smith, 437.

2. The word "until," is capable of either an exclusive or inclusive sense. The information alleged, that the defendants held certain offices in the service of the East India Company, from, &c. *until* the 29th November 1795; and afterwards charged, that each of the defendants, whilst he held and exercised the said office as aforesaid, did, to wit, on the 29th November 1795, receive a certain present, &c. Held, that the word *until*, was capable of an inclusive meaning, and that it appeared from the context, to have been intended in that sense. *Rex v. Stevens*, 5 East, 244; 1 Smith. 437.

- (b 6) 1. "*Fraudulenter*,"—" *sciens*,"—
2. "*Advisedly*,"—3. "*Wrongfully
intending to injure*."

1. Since fraud either implies knowledge, or may exist without it, in averring it, the word "*fraudulenter*," without "*sciens*," is sufficient. "*Sciens*" also, is sufficient by itself, since knowledge that an assertion is false, imports fraud. *Pasley v. Freeman*, 3 T. R. 60.

2. The term "*advisedly*," is equivalent to knowingly. *Rex v. Fuller*, 1 B. & P. 180.

3. The averment wrongfully intending to injure, is equivalent to maliciously. *Drewe v. Coulton*, 1 East, 563, n.

(b 7) "*Agreement*."

The term "*agreement*," imports mutual promises. *Mountford v. Horton*, 2 N. R. 62.

(b 8) "*Sold and delivered*."

The words "*sold and delivered*," imply a contract, since there cannot be a sale unless two parties agree. *Emery v. Fell*, 2 T. R. 30.

(b 9) "*Seised in fee*."

The alleging a seisin in fee, virtually includes an occupation by the party seised; to allege in addition, that the party is in the occupation of the land, is superfluous. *Bullard v. Harrison*, 4 M. & S. 387.

- (b 10) *Implication that a messuage was antient.*

The replication to a plea, claiming turbary in right of an antient messuage, averred, that divers antient messuages besides the defendant's, &c. Held, that this was a sufficient averment that the defendant's messuage was an antient one. *Clarkson v. Woodhouse*, 5 T. R. 412, n. (a)

- (b 11) *Implication of the continuance of a right to dig mines under copyholds.*

A claim, that the lord is seised in fee of mines underneath the copyholds, together with the liberty of boring for, &c. imports a right to exercise the same during the continuance of the copyholder's estate. *Bourne v. Taylor*, 10 East, 189.

- (b 12) *Implication that the division of a copyhold was before time of memory.*

An averment, that from time immemorial, until the division of a tenement

into moieties, the lord had been accustomed to take such an heriot, and since the division, had been accustomed to take such another, imports that the division was made before time of memory. *Kingsmill v. Bull*, 9 East, 184.

- (b 13) *Implication that articles were furnished for an illegal purpose.*

Under a plea in avoidance of a contract given for the price of goods, that they were sold by the plaintiff to the defendant to be by him applied to such an illegal purpose, it must be taken that they were furnished for the purpose of transgressing the law. *Lightfoot v. Tenant*, 1 B. & P. 551.

- (b 14) *Implication that payment on a sale was to be made by A.*

An averment that goods to be delivered to A. were to be paid for on delivery, sufficiently expresses, after verdict at least, that payment was to be made by A. *Jacobs v. Nelson*, 3 Taunt. 423.

- (b 15) *Implication in pleas under the Annuity Act.*

1. If the memorial of an annuity, state that the consideration was paid to both grantors, when in point of fact, it was to be appropriated by one alone, a party seeking to avoid the annuity for such defect in the memorial, must state that it was to be so appropriated; merely averring that it was paid not to both, but to one only, is not sufficient, since payment to one is *prima facie* payment on account of, and therefore to both. *Praed v. The Duchess of Cumberland*, 4 T. R. 585; 2 H. B. 280.

2. If the memorial of an annuity, states the payment of the consideration money to have been made by the grantee, when in point of fact it was made by his agent, it is defective. And though a plea to an action on the annuity bond simply denying that the money was paid by the grantor, is not sufficient to raise the objection to the memorial (since the import of such plea is, that neither in law nor in fact was payment made by the grantor. *Coare v. Giblett*, 4 East, 85.) yet a plea that whereas the memorial affirms that the grantor paid the money; now payment was made by his agent; is sufficient. *Horwood v. Underhill*, 3 M. & S. 82.

(b 16) *Implication of the manner of obstructing proceedings.*

An averment in a plea justifying a commitment for disturbing judicial proceedings, that the plaintiff made a great disturbance and obstructed the defendants, &c. sufficiently shews that the disturbance was the manner of obstruction. *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(c) *Examples of terms, which do not imply as above.*

(c 1) "False."

Falsehood may exist without fraud. An averment therefore, or proof that an assertion was false, is no affirmation that it was fraudulent. *Pasley v. Freeman*, 3 T. R. 60.

(c 2) *Terms which do not imply,—that A. and B. each omitted an act.*

An averment in pleading, that A. and B. have not done an act, means that both together have not performed it; it does not exclude the supposition, that A. by himself, or B. by himself has done the act. *Wilkinson v. Thorley*, 4 M. & S. 33.

(c 3) *That a retainer was for hire.*

An averment that the plaintiff retained the defendant, does not import that it was for hire or reward, unless the defendant is a public officer, as a carrier or innkeeper. *Elsee v. Gatward*, 5 T. R. 143.

(c 4) *That repairs were necessary.*

An averment that money has been expended in repairing premises, does not *ex vi termini* import that the repairs were necessary. *Shetelworth v. Neville*, 1 T. R. 454.

(c 5) *That an award was under seal.*

Bond for the performance of an award "so as it be made in writing under the hands of the arbitrators," by such a day. The declaration avers, that the arbitrators did in due manner, and within the time limited, duly make their award in writing. Held on error, after judgment for plaintiff on plea of judgment recovered, insufficient, without alleging that it was under their hands. *Everard v. Paterson*, 2 Mars. 304; 6 Taunt. 645.

(c 6) *That a right exists at all times of the year.*

An averment that "A, and all those

whose estate he has from time immemorial, were accustomed and during all the time aforesaid, ought to have common," is not equivalent to claiming it at all times of the year. *Hawkins v. Eckles*, 2 B. & P. 359.

(c 7) *That a prescriptive corporation continued.*

Under a plea stating that the corporation of C. was a prescriptive corporation, and then setting forth a charter by which the citizens and inhabitants of C. were incorporated, not stating that they were then a corporate body, the continuance of the prescriptive corporation is not to be intended. Therefore, a replication, that at the time of granting the charter they were not a corporation, is bad. *Rex v. Amery*; *Same v. Monk*, 1 T. R. 590.

(c 8) *That a note was for the payment of twenty pounds of money.*

The question in a criminal case, turned upon a note which was averred to be a note for twenty pounds; since this might mean pounds weight, held, that it should have been declared on as meaning 20 l. in money. *Anon.* mentioned by *Chambre, J.* in *Waugh v. Bussell*, 1 Mars. 214.

III. MODE OF DESIGNATING THE PARTIES TO THE SUIT.

(a) *As plaintiff and defendant.*

Where the parties are very numerous, their names (except the first) will be struck out, and "plaintiffs," or "defendants," substituted for them. *Mecke v. Oslade*, 1 N. R. 289; which mode of designation is sufficient in all cases. *Davidson v. Savage*, 2 Mars. 101; 6 Taunt. 121. *Stephenson v. Hunter*, 2 Mars. 101; 6 Taunt. 406.

IV. OF USING A VIDELICET.

Facts, for example, time and place, may always be alleged under a *videlicet*; since if it be material that they should have happened in the precise manner charged, the stating of them under a *videlicet* will not let in a latitude in the proof. *Rex v. Aylett*, 1 T. R. 63; *Johnson v. Pickett*, Id. 68.

V. MISCELLANEOUS.

(a) *Mode of describing the commencement of a suit in K. B. by original.*

An action by original, in the K. B.

may be described as having been commenced therein. *Mayo v. Rogers*, 14 East, 539.

VI. ON RULES OF CONSTRUCTION.

(a) *General rules.*

(a 1) *Relative to expressions which have or have not acquired a definite sense, —example, indictments for perjury, and for fraud.*

1. Unless where expressions have a technical and definite signification, they are to be construed in that sense in which, from the context and reason of the thing, they appear to have been used. *Rex v. Stevens*, 5 East, 244; 1 Smith, 437.

2. Expressions which for a long time, and which may be proved from precedents, have been used in pleading in an indefinite sense, though in strictness they may admit of a definite one, yet shall be construed in the former. Thus, it has been the constant practice on indictments for perjury, and likewise in those for obtaining money under false pretences, to aver, not merely that the defendant "falsely," &c. but to go farther, and assert by specific averment, that whereas in truth, &c. The inference from this is, that all the facts following the word "falsely" are not meant to be charged as false, for usually there is no necessity that they should; if they were, where is the use of the other specific averment; and that it is left to the specific formal averment to determine what the prosecutor means to charge as false. Hence, falsely, is a word of uncertain, unspecific, and therefore insufficient averment in such cases. *Rex v. Perrott*, 2 M. & S. 379.

(a 2) *Relative to expressions which have two senses.*

Where an averment admits of two intendments, that shall be preferred which will support the pleading. *Kaye v. Bolton*, 6 T. R. 134.

(a 3) *Intendment is against captious objections.*

The court will make any intendment against a mere captious objection. *Pugh v. Robinson*, 1 T. R. 117.

(b) *Particular instances.*

(b 1) *"Whereupon," as applied to time.*

In pleading, where, after stating that a fact happened on such a day, it is averred,

—whereupon it was done so and so; the word "whereupon," refers to the time last stated, so as to be a sufficient averment that the latter fact happened on that day. Hence, where the record of an outlawry, after stating that the *capias* was returned on such a day, proceeds,—whereupon the exigent was awarded, it is a sufficient averment that the exigent issued on that day. *Rex v. Perry*, 6 T. R. 573.

(b 2) *"The king's seal of Great Britain."*

The averment,—“the king's seal of Great Britain;” means the great seal. *Rex v. Yandell*, 4 T. R. 521. See *Rex v. Bullock*, 1 Taunt. 71.

(b 3) *"His majesty's court of the Bench."*

The averment,—“his majesty's court of the Bench (*Mill v. Pollon*, 7 Taunt. 271) at Westminster,” means the court of Common Pleas; for supposing that the words “court of the Bench” are equivocal, the addition, “at Westminster,” designates by its locality, the court of Common Pleas; had the court of K. B. been intended it would have been described as “wheresoever,” &c. *Impey v. Taylor*, 3 M. & S. 166.

(b 4) *Averment that a suit by original in K.B. was commenced and depending therein.*

In describing an action by original as having been “then lately commenced and depending in the K. B.” the word “commenced” may be referred to the court of Chancery. *Mayo v. Rogers*, 14 East, 539.

(b 5) *"Mayor and burgesses in common council assembled."*

The phrase,—“the mayor and burgesses in common council assembled,” does not necessarily mean a meeting of the whole corporation in common hall assembled, but may be taken, after verdict at least, as descriptive of a select part of the corporate body. *Rex v. Knight*, 4 T. R. 425.

POOR.

I. OF PERSONS LIABLE TO BE RATED TO.

(a) *The term "inhabitant," defined, p. 750.*

(b) *A corporate body, p. 750.*

II. OF PROPERTY LIABLE TO BE RATED.

(a) General rules.

(a 1) *In relation to the nature of the property, p. 750.*

(a 2) *Certainty in the value of the property, whether material, p. 750.*

(a 3) *Presumptions are in favour of rateability, p. 751.*

(a 4) *In relation to the case where there is no occupier, p. 751.*

(a 5) *Exemption of, by a statute—able exemption from "public tax, assessment or charge," p. 751.*

(b) Rateability of real property.

(b 1) *Nature of the title or interest, p. 751.*

(b 2) *Nature of the occupation,—general rules, p. 751.*

(b 3) *Nature of the occupation,—particular instances, p. 751.*

(b 4) *Lands given for charitable purposes, p. 752.*

(b 5) *Nature of the profit defined, p. 752.*

(b 6) *Property vested in trustees under a drainage act, p. 752.*

(b 7) *The trustees of a quakers' meeting-house, p. 752.*

(b 8) *The trustees of a Methodist chapel, p. 752.*

(b 9) *An easement, p. 753.*

(b 10) *Rent, p. 753.*

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I. OF PERSONS LIABLE TO BE RATED TO.

- (a) *The term "inhabitant," defined.*

The word "inhabitant," in the statute of Eliz. means a resident within the parish. *Rex v. Nicholson*, 12 East, 330; *Rex v. Jones*, Id. 346; *Rex v. Bishop of Rochester*, Id. 353.

- (b) *A corporate body.*

A corporate body is rateable. *Rex v. Gardner*, Cowp. 79; *Rex v. Mayor of London*, 4 T. R. 21; *Rex v. Saltersload Stnace*, 4 T. R. 730; *Rex v. Bath Corporation*, 14 East, 621.

II. OF PROPERTY LIABLE TO BE RATED.

- (a) *General rules.*

- (a 1) *In relation to the nature of the property.*

The rate must be confined to visible property yielding profit in the parish. *Rex v. White*, 4 T. R. 771.

- (a 2) *Certainty in the value of the property, whether material.*

Uncertainty in the value of property is

not a reason against its rateability. Dougl. 303. *Infra*, (b 5).

(a 3) *Presumptions are in favour of rateability.*

When property is profitable in its nature, as lands and houses, it will be considered by the court as rateable, unless it is expressly stated to them that no profit can be derived from it. *Rex v. Agar*, 14 East, 256.

(a 4) *In relation to the case where there is no occupier.*

If no person can be found to answer the description of rateable occupier, no rate can be made. *Holford v. Copeland*, 3 B. & P. 141.

(a 5) *Exemption of, by a statutable exemption from "public tax, assessment, or charge."*

Where lands given to a charitable purpose were declared, by a Private Act, to be discharged from any manner of public tax, assessment, or charge whatsoever, this was held to extend to the poor's-rate. *Rex v. Scott*, 3 T. R. 602.

(b) *Rateability of real property.*

(b 1) *Nature of the title or interest.*

1. If a party occupy lands, by whatever title, he is rateable to the poor. *Lord Bute v. Grindall*, 1 T. R. 338; 2 H. B. 265; Dougl. 304.

2. An occupier is rateable, though his title is altogether defective. *Rex v. Bell*, 7 T. R. 598.

3. The law looks to the productive value of the thing as the fund to be taxed, without reference to the occupier's beneficial share in it; for the tax is laid upon the entire profit which the property yields, to whomsoever payable. *Rex v. Parrot*, 5 T. R. 593.

(b 2) *Nature of the occupation,—general rules.*

1. Property which does not lie in occupancy, according to the strict common law sense of the word, may be rateable. Dougl. 304.

2. An occupier liable to be turned out for misconduct, is rateable. *Rex v. Munday*, 1 East, 584.

3. A distinction is to be taken between possession subject to the control of a superior, and a joint enjoyment of an undi-

vided property, where all must be considered as rateable occupiers. *Rex v. Munday*, 1 East, 584; *Rex v. Watson*, 5 East, 480; 2 Smith, 144.

4. If the owner of rateable property licenses another to make use of it, the latter cannot be rated in respect of such license, since then the same property would be rated twice. *Rex v. Jolliffe*, 2 T. R. 90.

5. Wherever an occupier exists for private benefit, he may be rated, and it makes no difference whether he is a civil or military officer of the crown. *Rex v. Terrot*, 3 East, 514.

6. Property belonging to the crown, or to the public, is not rateable to the poor. Hence, the captain of a troop who rents stables by order of the crown, for the use of the troop, and who therefore is acting on behalf of the crown, is not rateable in respect of such leasehold: and even admitting that he would be if he occupied them, yet he is not where his own horses are not kept therein. *Lord Amherst v. Lord Somers*, 2 T. R. 372.

7. Crown property occupied by a subject, is rateable to the poor; and if in a case reserved on an appeal from the rate, the sessions state that the party is an occupier of the tenement, this precludes all question as to his rateability; as where they found that the master gunner at Seaford was the occupier of the battery-house there, which was the property of the crown, and whence he was removeable at pleasure. *Rex v. Hurdiss*, 3 T. R. 497.

(b 3) *Nature of the occupation,—particular instances.*

1. A poor person permitted to live rent free in the kitchen, the communication between which and the remainder of the house was stopped up, does not prevent the owner from being rateable as occupier of the entire house. *Rex v. St. Mary the Less*, 4 T. R. 477.

2. A servant at an annual salary, residing in two rooms within the walls of a lighthouse, to take care of the lights, his master being proprietor of the tolls, cannot be rated for these as the occupier. *Rex v. Tynemouth*, 12 East, 46.

3. Soldiers living in a barrack, are not rateable. *Lord Amherst v. Lord Somers*, 2 T. R. 372; *Rex v. Hurdiss*, 3 T. R. 497;

Eckersall v. Briggs, 4 T. R. 6; *Rex v. Terrott*, 3 East, 506.

4. A corporation having lands used as a common of pasture, and stocked by such resident burgesses as think fit, according to a certain annual stint fixed by the leet jury, and for which the burgesses who stock the common pay 19s. 4d. *per annum* to each of those who do not. Held, that certain resident burgesses, having such right to stock, and stocking the land for a certain year, were the occupiers of the land as tenants in common, and were therefore rateable to the poor in respect thereof. *Rex v. Watson*, 2 Smith, 144; 5 East, 480.

5. A woman covenanted with the Philanthropic Society to become their servant, in the capacity of matron or mistress, to superintend the children, at annual wages, to take apprentices and instruct them; she was to have a dwelling free from taxes, with certain other perquisites; she had no distinct apartments in the house provided by the Society, except a bed-chamber, and her family were not allowed to live there; and she was liable to be dismissed at a month's notice, on an allowance of three months wages instead thereof. She is a mere servant. *Rex v. Field*, 5 T. R. 587.

6. A surgeon was occasionally absent from home, and left an assistant in part of his house, his wife and daughter also being absent; and the assistant had only the use of the shop, the remainder of the house being completely parted from it. The garden was taken care of by a person paid by the appellant, and his furniture continued in its usual situation in all the rooms, ready for the family's reception, during the whole time, and the person with whom the key was left, permitted a friend of the appellant's and her servants to reside there for two months while the family was away. He was held rateable as occupier of the whole house during the period of his absence. *Rex v. Aberystwith*, 10 East, 354.

7. The 48th Geo. III. vested the aftermath of a large meadow in trustees, in trust for the burgesses and principal householders of T, freed from all other interest in the same, with power to let the whole, or any part or parts, annually, for the best rent, and also to let it in pastures for horses, cattle, and sheep, to dif-

ferent persons, at such rates, and subject to such regulations, as the trustees should appoint, or by writing under their hands and seals, to demise the same for a term of years, &c.; and that the rents and profits should, after payment of all charges, be divided by the trustees among the objects of the trust. The trustees, not being able to let this aftermath together for its value, let it out in pastures, at a certain sum per head for horses, cattle, and sheep, to various persons, who enjoyed the same by turning their cattle out, and the trustees did not otherwise occupy it. Held, that the trustees were rateable as occupiers. *Rex v. Trustees, &c. of Tewsbury*, 13 East, 155.

(b 4) *Lands given for charitable purposes.*

The charitable purposes for which land is given in occupation, does not excuse an occupier who is otherwise within the act. *Rex v. Catt*, 6 T. R. 332; *Rex v. Munday*, 1 East, 584.

(b 5) *Nature of the profit defined.*

Where a profit does exist, it is immaterial whether the return is annual and in a fixed unvarying proportion, or whether it is uncertain in the amount, and subject to risk and expense. *Jones v. Maunsell*, Dougl. 302; *Rowls v. Gells*, Cowp. 451; *Atkins v. Davis*, Cald. 325; *Rex v. Alderbury*, 1 East, 534; *Rex v. Woodland*, 2 East, 164.

(b 6) *Property vested in trustees under a drainage act.*

Trustees under a drainage act are not rateable in A. for lands purchased, and buildings erected by them there, for the outlet of the drainage, where they received no benefit for such property in A, the whole being devised to the owners of lands in other parishes which were drained by the outlet. *Rex v. Sculcoates*, 12 East, 40.

(b 7) *The trustees of a Quakers' meeting-house.*

The trustees of a Quakers' meeting-house, of which no profit is made by the pews or otherwise, are not rateable. *Rex v. Woodward*, 5 T. R. 79.

(b 8) *The trustees of a methodist chapel.*

The trustees of a methodist chapel in whom the fee was vested, and who let

out the pews for an annual rent, were held rateable for the chapel, though they expended more than the annual rent in supporting the establishment, repairs, &c. *Rex v. Agar*, 14 East, 258.

(b 9) *An easement.*

An easement is not rateable. *Rex v. Jolliffe*, 2 T. R. 90.

(b 10) *Rent.*

Rent (as the rent of mines) is not rateable. *Rex v. Welbank*, 4 M. & S. 222.

(b 11) *Quit-rents and casual profits of a manor.*

Quit-rents and the casual profits of a manor, such as fines paid upon renewal of copyholds, heriots, &c. are not assessable; the occupiers being respectively assessed to the entire value of the lands out of which these interests arise. *Rex v. Vandewall*, 2 Burr. 991; *Rex v. Alderbury*, 1 East, 536.

(b 12) *The renting of a dairy.*

Semble, a dairyman who rents a farmer's cows under an agreement that they should be depastured in particular parts of the farm, ought not to be rated separately; but there should be one rate upon the farmer for the entire profits of the farm. *Rex v. Brown*, 8 East, 528.

(b 13) *Tolls.*

1. If tolls are connected with real and substantial property, they may be rated conjunctively with that property, if situated within the parish, which yields profit there by means of the tolls. *Rex v. Macdonald*, 12 East, 324. And see *Lofft*, 78, as to the tolls of a lighthouse.

2. That tolls not annexed to any thing real and substantial locally situated within the parish or township rated may be rateable, the owner must reside within the limits for which the assessment is made. *Rex v. Tynemouth*, 12 East, 46; *Rex v. Nicholson*, 12 East, 330; *Williams v. Jones*, 12 East, 346; *Rex v. Eyre*, Id. 416.

(b 14) *Canal tolls.*

1. The profits arising from tolls payable for carriage of goods on navigable canals, are rateable. *Rex v. Page*, 4 T. R. 543; *Rex v. Aire and Calder Navigation*, 2 T. R. 660; *Rex v. Stafford's Navigation*,

8 T. R. 340; *Rex v. Mayor of London*, 4 T. R. 21.

2. The tolls of a sluice in a navigation were vested in commissioners by statute, "to be applied and disposed of to the uses and purposes of the said act, and to no other whatever;" these uses, &c. being for improving the navigation, and draining the land. The commissioners cannot be rated for these tolls, because they are mere trustees to superintend the execution of the act, without any personal advantage. *Rex v. Salter's Sluice Navigation*, 4 T. R. 730.

(b 15) *Turnpike tolls.*

Turnpike and other tolls paid for the public benefit, and not of private individuals, are not rateable. *Rex v. Staffordshire Navigation*, 8 T. R. 340.

(b 16) *Tolls of a bargeway leased.*

The Corporation of London was held rateable for the tolls of a bargeway of which the herbage and pannage was demised to a lessee who was rated for them. *Rex v. Mayor of London*, 4 T. R. 21.

(b 17) *The lock and tunnel of a canal.*

The lock and tunnel of a canal is rateable for the dues and rates which become due there. *Rex v. Macdonald*, 12 East, 324.

(b 18) *Toll tin.*

The portions of the tin got by adventurers in the tin mines in Cornwall, and payable to the land-owners, called "toll and farm tin," and "toll tin or dues," are rateable to the poor. *Rex v. St. Agnes*, 3 T. R. 480.

(b 19) *The modus of tithes.*

A modus for tithes is rateable. *Dougl.* 405.

(b 20) *The tithe of fish.*

The tithe of fish is rateable to the poor under the provision in stat. 43 Eliz. c. 2, s. 1, making tithes impropriate and impropriations of tithes rateable. *Rex v. Carlyon*, 3 T. R. 385.

(b 21) *A fishery.*

1. A mere incorporeal fishery is not rateable. *Rex v. Ellis*, 1 M. & S. 652.

2. The lessee in possession "of a fishery of the Halves and Halvendoles, with the fishings called Unlawater, with

the appurtenances to the Halves due and accustomed within the river Severn," is rateable for them as occupier of so much lands covered with water over which the fishery is enjoyed. *Rex v. Ellis*, 1 M. & S. 652.

(b 22) *A reservoir.*

Profits accruing in the parish from a reservoir for collecting water for the purpose of supplying a city with water, may be included in an assessment upon "the reservoirs and water kept therein." *Rex v. Bath Corporation*, 14 East, 609; *Rex v. Rochdale Waterworks*, 1 M. & S. 634.

(b 23) *A waggon-way.*

The occupier of land over which a way-leave, or way-leave waggon-way is erected, for the purpose of carrying coals from his mine, is rateable for the value of the waggon-way. *Rex v. Bell*, 7 T. R. 598.

(b 24) *Saleable underwoods.*

By "saleable underwoods" are meant, underwoods intended or destined for sale, in contradistinction to such as are to supply the landlord with estovers for fuel and the other purposes of the estate. *Rex v. Mirfield*, 10 East, 219.

(b 25) *Mines.*

1. All mines, except coal mines, are exempt. *Rex v. Cuninghame*, 5 East, 478. And coal mines are rateable by the express words of the statute. *Rex v. Parrot*, 5 T. R. 593.

2. The particular use to which the produce of a coal mine is applied by the owner of the lands, does not exempt it. *Rex v. Cunningham*, 5 East, 478.

(b 26) *Profits of lot and cope.*

The lessee of the crown of lead mines is rateable to the poor for the profits arising from lot and cope, which are duties paid to him by the adventurers without any risk on his part. *Rowls v. Gells*, Cowp. 451.

(b 27) *A coal mine exhausted, under lease.*

The lessee of a coal mine become exhausted, is not rateable, though still bound to pay the rent. *Rex v. Bedworth*, 8 East, 387.

(b 28) *A slate quarry.*

A slate quarry is rateable, though the

working of such quarries is a thing of great expense and risk, and is always considered as a matter of uncertainty and speculation. *Rex v. Woodland*, 2 East, 164.

(b 29) *Lime-works.*

The profits of lime-works are rateable in the hands of the occupier, although uncertain in their amount, owing to the expense and risk of working. *Rex v. Alderbury*, 1 East, 534.

(b 30) *Clay pits.*

Clay-pits, worked at considerable expense, and with fluctuating profit, are rateable. *Rex v. Brown*, 8 East, 528.

(b 31) *Calamine.*

Lot toll and free share of calamine to be raised within a manor are rateable. *Rex v. Baptist Mill Company*, 1 M & S. 612.

(c) *Rateability of personal property.*

(c 1) *General rules.*

1. The general rule is, that personal property is rateable. The cases in which it is not, are exceptions to the rule, and arise from the impracticability of rating it. *Rex v. Hogg*, 1 T. R. 726, 727.

2. To render personal property rateable, it must not only be in the possession of the person rated, but when distinctly assessed as moveables it should be his actual property. *Rex v. Ringwood*, Cowp. 326; *Rex v. Dursley*, 6 T. R. 53.

3. Though personal property exists in the parish, it cannot be rated, unless the proprietor reside there also. *Rex v. Jones*, 8 East, 451; *Rex v. Liverpool*, Id. 456, n.; *Rex v. Collison*, Ibid.; *Rex v. Hound*, Ibid.

4. Personal property must yield a profit in the hands of him who is rated, or it cannot be assessed. *Rex v. Andover*, Cowp. 550; *Rex v. Dursley*, 6 T. R. 53; *Rex v. Macdonald*, 12 East, 324; *Rex v. Ambleside*, 16 East, 380.

(c 2) *Rateability of money in hand.*

A sum of money, in a man's possession, is not rateable. *Rex v. White*, 4 T. R. 771. See *Rex v. Mast*, 6 T. R. 154.

(c 3) *Rateability of furniture.*

Furniture is not rateable as personal property. *Rex v. White*, 4 T. R. 771.

(c 4) *Rateability of funded property.*

Stocks or annuities in the public funds are not rateable to the poor under 43 Eliz. c. 2, nor as money out at interest under 10 Ann. c. 6, private act. *Rex v. St. John's Maddermarket, Norwich*, 2 Smith, 270; 6 East, 182.

(c 5) *Rateability of money vested on real security.*

The owner was adjudged not rateable in the parish where he resided, for money which he had vested in real securities upon lands lying without the parish. *Rex v. White*, 4 T. R. 771.

(c 6) *Rateability of stock in trade.*

1. Stock in trade, yielding profit, when its value can be ascertained, is rateable to the poor. *Rex v. Mast*, 6 T. R. 154; *Rex v. Dartington*, Id. 468; *Rex v. Amble-side*, 16 East, 380.

2. Where it has been the usage in a parish to rate persons to the poor for their stock in trade within the parish, such persons are liable under 43 Eliz. c. 2, to be rated to the poor in respect thereof. *Rex v. Hill*, Cowp. 613.

(c 7) *Rateability of stock on a farm.*

The stock of the farm is exempt, although it is underlet to another person, in such a way that the taking constitutes a tenement distinct from the farmers. *Rex v. Brown*, 8 East, 528.

(c 8) *Rateability of the profits of an office.*

1. The ranger of a royal park, holding his office at pleasure, is not liable to be rated in respect of the herbage and pannage of the park, since they yield him no profits; *secus*, in respect of land in the park, which he incloses and cultivates, since of this he is an occupier. *Lord Bute v. Grindall*, 1 T. R. 338; 2 H. B. 265.

2. An officer in the customs, a captain in the navy or merchant service, and a clerk to a merchant, have been held not rateable for their respective salaries. *Rex v. White*, 4 T. R. 771.

3. An attorney is not rateable for the profits of his profession. *Rex v. Startisfant*, 7 T. R. 60.

(c 9) *Rateability of the produce of labour.*

Though labour cannot be rated, yet the

produce of labour may. *Rex v. Hogg*, 1 T. R. 727.

(c 10) *Rateability of a silk throwster.*

A silk throwster is not rateable for the profit he makes by cleaning and throwing his employer's silk. *Rex v. Sherborne*, 8 East, 537.

(d) *Rateability of land invested by statute with the properties of personality.*

Where a statute directs that real property shall be accounted personal, and its object is, that thereby it may be descendible and transferrable, like personal property; it invests it with the incidents of personality, so far only as is sufficient for the end in view; for all other purposes the land retains its original properties. Therefore lands converted into a dock under an act of parliament, which declares that the shares of the proprietors shall be considered as personal property, are, as before, rateable to the poor, and in proportion to the annual profits. *Rex v. The Dock Company of Hull*, 1 T. R. 219.

(e) *Rateability of realty and personality occupied together.*

1. Real and personal property occupied as one entire thing are rateable to the poor. Thus, a house and engine for carding cotton, rented as one entire subject, and called "the engine-house:" so a house, with a weighing machine, called "the machine-house." *Rex v. Hogg*, 1 T. R. 721; *Rex v. The Parish Officers of St. Nicholas, Gloucester*, Id. 723, n. (a).

2. In deciding whether real and personal property are occupied as one entire thing, and therefore rateable as such, it is immaterial that the one will go to the executor, the other to the heir. *Rex v. Hogg*, 1 T. R. 721.

(f) *Miscellaneous.*(f 1) *Rateability of parochial assessments, &c. in Coventry.*

The parochial assessments for the vicar of St. Michael, in Coventry, established by 19 Geo. III, c. 60, are not rateable. *Rex v. Toms*, Dougl. 401. But those for the vicar of the Trinity, in the same place, established by 19 Geo. III, c. 57, are. *Rann v. Pickin*, Dougl. 406, n.

(f2) *Rateability of the Leeds Canal Company.*

Rateability of the Leeds and Liverpool Canal Company. *Rex v. Same*, 5 East, 325.

(f3) *Rateability of the London Dock Company.*

Rateability of the London Dock Company, in 1807, for works then completed. *Rex v. St. George Middlesex*, 9 East, 127.

III. OF THE PLACE IN WHICH THE PROPERTY IS LIABLE TO BE RATED.

(a) *Rule in the case of a rate on profits.*

Where profits are rateable, they are rateable at the place where they become due, not where they are actually received. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660.

(b) *Rule in the case of canal tolls.*

1. Tolls are rateable where the voyage is completed, though in fact collected elsewhere. *Rex v. Page*, 4 T. R. 543.

2. In the case of profits arising from tolls upon bargeways or inland navigations which run through several parishes, they are rateable where the tolls become due. *Rex v. Air and Calder Navigation*, 2 T. R. 660; *Rex v. Mayor of London*, 4 T. R. 21; *Rex v. Page*, 4 T. R. 543; *Rex v. Staffordshire Navigation*, 8 T. R. 340; *Rex v. Leeds and Liverpool Canal*, 5 East, 325; even where the tolls were directed by statute to be taken at so much per mile upon all goods. 2 T. R. *sup.*

3. Profits arising from tolls upon bargeways or inland navigation, which run through several parishes, are to be rated where the tolls become due. And where any part of the line of carriage is exempt from being rated; in calculating the quantum of toll which is the subject of the rate, allowance must be made for so much of the toll as accrued in respect of the line exempted. *Rex v. Leeds and Liverpool Canal Company*, 5 East, 325.

4. In ordinary cases, no portion of the toll payable for goods transported by a canal or navigation is due, except at the place to which they are to be carried. The proprietor of the toll, therefore, is only rateable in respect of it at that place, and there for the full amount of it. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660.

5. The grantee of the right of Navigation of the river Ouze, between Erith and Bedford, is rateable to the poor of the parish of Cardington, in respect of the tolls arising from a sluice erected there; though he himself resides elsewhere and the tolls are collected in another parish. *Rex v. Cardington*, Cowp. 581.

(c) *Rule in the case of ship-owners.*

The owners of ships are, when resident, rateable to that parish in which the ships lie, if the port is their home. *Rex v. White*, 4 T. R. 771; *Rex v. Jones*, 8 East, 452.

(d) *Rule in the case of a land improved by a spring.*

Land improved by a spring rising within it, is rateable for such improvement in the parish where it lies, not where the profits accruing from the water are received. *Rex v. New River Company*, 1 M. & S. 503.

(e) *Miscellaneous.*

Where part of a farm lay in the township of W. and part in the parish of B, a poor rate for the parish of B, for the part in B, was held good; though previously the tenant had paid only poor rates to A, but he had paid tithes and church rate to B. *Rex v. Etwell*, 3 Smith, 15.

IV. RELATIVE TO THE RATE.

(a) *Subjects of,—the repairing or rebuilding a workhouse.*

A rate cannot be made for repairing or rebuilding a workhouse. *Rex v. Wetell*, Doug. 116.

(b) *Proportions of.*(b 1) *General rules.*

1. Every circumstance and incident attending rateable property, which adds to its value, is, so far as its rateability is concerned, to be considered parcel of and appurtenant to it,—as forming a part of its rateable value; all the things therefore which tend to give it one entire value, must be thrown together when a rate is propounded. Hence, where a canteen in a barrack was demised for 15 *l.* per annum; and the further sum of 510 *l.* was to be paid by the lessee "for the privilege of using it as a canteen and selling therein provisions," &c.; held that the rateable value of the property was 525 *l.* and not 15 *l.* *Rex v. Bradford*, 4 M. & S. 317.

2. The rate must be in proportion to

the profits. If a private house be rated at any particular sum, and it be converted into a shop, the rate must be increased in proportion to the increased value of the house; but if the shop be again converted into a private house, the rate must proportionably decrease. *Rex v. The Parish Officers of St. Nicholas, Gloucester*, 1 T. R. 724, n.

(b 2) *Rule in case of real property.*

Real property is assessed upon the principle,—that the tax shall be imposed on the actual productive value of the particular subject at the time of making the rate, whether that is more or less than what it had been when the former rate was made, and howsoever it became so. *Kemp v. Spence*, 2 Bl. 1245; *Rex v. Gardner*, Cowp. 84; *Rex v. St. Luke's*, 2 Burr. 1153; *Rex v. Mast*, 6 T. R. 154; *Rex v. Skingle*, 7 T. R. 549.

(b 3) *Rule in the case of houses.*

Whether houses shall be rated in a different proportion from land, must depend upon local circumstances, and the court will not quash an order for rating them equally. *Rex v. Swannage*, Dougl. 562.

(b 4) *Rule in the case of land improved by a spring.*

If a party rent a quantity of land, together with a mineral spring thereout arising, at a gross yearly rent, he is rateable to the poor in respect of the whole of such rent; though in fact the annual value of the land, independant of the spring, is only in proportion of two to eight of the reserved rent. *Rex v. Miller*, Cowp. 619.

(b 5) *Rule in the case of personal property.*

1. The total amount of a man's debts is to be deducted, and the tax laid upon the profits of his surplus property. *Rex v. White*, 4 T. R. 771; 4 Burr. 2011.

2. A trader may subtract the interest of borrowed capital, for it is in the nature of an incumbrance upon the goods. *Rex v. Dursley*, 6 T. R. 53.

(b 6) *Rule in relation to different districts.*

1. If the sessions make an order directing two districts of the same parish to contribute to the maintenance of the poor of the entire parish in certain proportions,

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it is extra-judicial and void. *Rex v. Newell*, 4 T. R. 266.

2. The term "proportions" in 12 Geo. II, c. 29, s. 1, means the proportion which one entire district bears to other entire districts within the jurisdiction of the justices, and not the subdivisions of each particular district. *Rex v. Justices of West Riding of Yorkshire*, 12 East, 117.

(c) *Mode of assessing.*

(c 1) *Whether by one overseer.*

Semble, a rate cannot be made by one overseer. *Rex v. Atkins*, 4 T. R. 12.

(c 2) *In the case of saleable underwoods.*

Saleable underwoods are not to be rated for that year only, when a periodical profit can be fairly and seasonably made of them; but they are at all times rateable according to the improvement in their value, or in the rent which might fairly be expected from them. *Rex v. Mirfield*, 10 East, 219.

(d) *Allowance of.*

(d 1) *Whether an act of form.*

The allowance by justices of a poor's-rate is a mere matter of form. *Rex v. Kynaston*, 1 East, 118.

(e) *Publication of.*

(e 1) *When made.*

The rate must be published on the Sunday ensuing the allowance. *Rex v. Newcombe*, 4 T. R. 368.

(f) *Whether impugnable by matter dehors.*

A rate, legal upon the face of it, will not be quashed upon a case reserved, because made, in fact, for an illegal purpose. *Rex v. Corporation of Gloucester*, 5 T. R. 346.

(g) *Inequality in, whether objectionable.*

The court of K. B. will never interfere in a question as to the equality or inequality of a poor's rate, unless upon the face of it, it manifestly appear to be unequal. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660.

(h) *Omission or excess in, with respect to local limits, whether objectionable.*

It is a good ground of appeal, that the poor's-rate is made for part of the parish, when it should have been made for the whole. *Rex v. Watson*, 7 East, 214; or

e converso for the whole, when it should only include a township; *Rex v. Leigh*, 3 T. R. 746; *Rex v. Newell*, 4 T. R. 266; (but see *Rex v. Beeding*, Cald. 92;) and the objection is equally fatal, that it is made for an extra-parochial place, for which none ought to be made.

(i) *Diminution of, on appeal.*

The sessions on appeal may, under stat. 17 Geo. II, c. 38, diminish a poor's-rate, by which a party is overcharged. *Rex v. The Inhabitants of Cheshunt*, 2 T. R. 623.

(k) *Amendment and quashing of.*

(k 1) *Amendment of,—previous to 41 Geo. III.*

All amendments of rates were confined to two cases prior to 41 Geo. III, c. 23. 1. Mere defects of form under 5 Geo. II, c. 19. 2. Where the appellant, being overcharged, might be reduced. *Rex v. Maddern*, 1 T. R. 625; *Rex v. Cheshunt*, 2 T. R. 623; *Rex v. St. Agnes*, 3 T. R. 480; *Rex v. Darlington*, 6 T. R. 468.

(k 2) *Amendment of,—in the case of omission.*

1. On appeal from a poor's-rate, because particular persons or particular property only are omitted in the rate, the sessions ought not to quash the whole rate, but should amend it in such particulars. *Rex v. Ringwood*, Cowp. 326.

2. Where the sessions confirmed a rate, and K. B. was of opinion that certain burgesses, who occupied lands as tenants in common, had been improperly omitted, the rate (i.e. the order of sessions) was sent back to have the rate amended, by the insertion of the burgesses occupying the land. *Rex v. Watson*, 5 East, 480; 2 Smith, 144.

(k 3) *Quashing of,—general rule.*

If any error in a rate affects the proportion payable by every person rated, the rate must be quashed in toto. Dougl. 563.

(k 4) *Quashing of,—in the case of excess.*

A joint poor's-rate for two things, one of which is not rateable, not distinguishing how much for each, is bad altogether. *Rex v. Ilbank*, 4 M. & S. 222.

(k 5) *Quashing of,—in the case of omission.*

1. A rate defective, from omitting to name a party liable thereto, cannot be amended by adding his name, but must be quashed. The only method of amending it would be to add the party, and rate him in the same proportion with the others; but then all would be required to pay more than they were legally bound to pay at that time. *Rex v. The Parish Officers of Maddern*, 1 T. R. 625.

2. Where the sessions quashed a rate, and it appeared to K. B. that a large tract of rateable land was not assessed therein, the order of sessions was confirmed. *Rex v. Aberavon*, 5 East, 453.

(k 6) *Quashing of,—by K. B.*

1. If a rate appear to be illegal by the title, the court will quash it, though no special case has been stated. *Rex v. Wavell*, Dougl. 116.

2. K. B. will not quash a poor-rate, unless it is unequal upon the face of it. *Rex v. Hardy*, Cowp. 579.

3. If upon removal of an order of sessions, adjudging that certain persons ought to be added to a poor-rate, and ordering the rate to be amended accordingly, the sessions omit to state that such persons had notice, or appeared and were heard on the appeal, it is fatal. *Rex v. Churchwardens of Andover*, Cowp. 550.

(l) *On the means of compelling payment of.*

(l 1) *Course of proceeding on the complaint.*

On complaint to magistrates of non-payment of a poor's-rate, their first duty is to summon the party, or if dead, his representative. *Rex v. Benn*, 6 T. R. 198.

(l 2) *Warrant of distress,—a judicial act.*

A magistrate, in granting a warrant of distress for a poor's-rate, acts judicially. *Harper v. Carr*, 7 T. R. 270.

(l 3) *A tender by landlord equivalent to a tender by tenant.*

If a landlord tender the rate for his tenant, the overseer ought to receive it, and a warrant ought not to be granted to distrain on the tenant. *Rex v. Cozons*, Dougl. 426.

(m) *Of rating parishes in aid.*

1. County magistrates cannot rate a parish within their jurisdiction, in aid of

one without, though lying within the county. *Rex v. Holbeche*, 4 T. R. 778.

2. A case of two parishes incorporated by 32 Geo. III, c. 99, and one rated in aid of the other. *Rex v. St. Helen's, Worcester*, 2 East, 417.

V. RELATIVE TO THE RELIEF AND MAINTENANCE OF.

(a) *Of casual poor.*

Casual poor have a claim for support upon whatever parish they may be found in. Therefore, where a pauper having fractured his leg in the parish of X, was conveyed to a house in the parish of Y, as the nearest and most convenient, it was held that Y, and not X, parish, were bound to provide for and take care of him. *Lamb v. Bance*, 4 M. & S. 275.

(b) *Of the order of maintenance.*

(b 1) *Exclusion of the jurisdiction of county magistrates over, in a particular case.*

Where 4 Geo. III, c. 90, was passed for incorporating two hundreds, and directed that a house should be built for the poor's reception, and provided that three months after the house should be built, "the said poor persons, and persons incapable of providing for themselves, should be under the government and management of the said guardians of the poor;" held, that this excluded the magistrates of the county from any jurisdiction to make an order for the relief of poor living within that district. *Rex v. Keer*, 5 T. R. 159; 1 Bott. 410, pl. 501.

(c) *Weekly allowance, when due.*

An allowance to a pauper, ordered to be paid weekly, is due at the beginning of the week. *Rex v. Fearnley*, 1 T. R. 316.

(d) *Obligation to go to the workhouse, on whom imposed.*

Under st. 9 Geo. I, c. 7, s. 4, the party for whom relief is demanded, can alone be required to go to the workhouse; thus, the infant child of a mother, who asks relief for it, and not the mother as well. *Rex v. Haigh*, 3 T. R. 637.

(e) *In relation to st. 22 Geo. III, c. 83.*

The 36th section of statute 22 Geo. III, c. 83, enacts, that, "the justice shall not examine the guardian, unless application

shall have been first made to the visitor (it being part of his duty to adjust matters of that sort) who shall order relief, if he thinks necessary, either *within* or *out* of the poor-house, as he shall judge right; and if sufficient relief shall not be given, the poor person complaining shall be redressed by the justice in the manner before directed." Under this statute the justice has no jurisdiction to change the nature or quality of the relief ordered by the visitor, but only to increase the amount. Thus, if the visitor order, that the pauper shall be relieved *in* the poor-house, the justice cannot order that he be relieved *out*. The question, whether relief in or out is the most fit, is left to the visitor alone to decide. *Rex v. Laughton*, 2 M. & S. 324.

(f) *In relation to stat. 43 Geo. III, c. 47, s. 2, & 5. (militia).*

The 43 Geo. III, c. 47, s. 2 & 5, refers as well to the case of a substitute, who having a wife or child, shall fraudulently and falsely declare at the time of his enrolment, that he has no wife or family; as to one, who having more than one child, shall fraudulently and falsely declare that he has only one. *Rex v. Preston*, 13 East, 313.

(g) *Of reimbursement.*

1. The parish to which the principal militia-man belongs, is liable to reimburse that of the substitute the expense of maintaining his family, although the substitute had more than one child when enrolled, *Rex v. Willis*, 6 T. R. 179; or had neither been approved nor enrolled, provided he is sworn in and actually serves. *Rex v. Ledbury*, 7 T. R. 558.

2. The order of maintenance and reimbursement must be made by the same justice and at the same time. *Rex v. Ledbury*, 7 T. R. 558.

VI. RELATIVE TO THE REMOVAL OF.

(a) *Persons liable or not to be removed.*

(a 1) *A married woman pregnant with a bastard.*

A married woman, who in the absence of her husband abroad, is pregnant, under such circumstances as that the child would be deemed by law a bastard, is liable to be removed under 35 Geo. III. *Rex v. Tibbenham*, 9 East, 388.

(a 2) *A pregnant single woman in service.*

The stat. 35 Geo. III, c. 101, does not authorize the removal of a single woman living in service, because pregnant. *Rex v. Alveley*, 3 East, 563.

(a 3) *A wife by herself.*

Where the wife has a settlement, but the husband none, she may be removed alone to the place of her settlement, with her own and her husband's consent. *Rex v. Eltham*, 5 East, 113.

(b) *Of the original complaint.*(b 1) *Form of.*

The complaint should state that the paupers are become actually chargeable. *Rex v. Holm, Waver*, 11 East, 381.

(c) *Order of removal.*(c 1) *Evidence to warrant.*

An order, removing nurse children to their father's original settlement, founded not upon his evidence, since his attendance could not be procured, and not stating that he was dead, is valid. *Rex v. The Inhabitants of Bucklebury*, 1 T. R. 164.

(c 2) *Form of,—statement of the jurisdiction.*

An order to be final and conclusive, must not be *ex facie* null. It must appear, therefore, on the face of the order, to be made by two justices having a competent jurisdiction. *Rex v. Chilterscoton*, 8 T. R. 178.

(c 3) *Form of,—name of the parish.*

In an order of removal, it is sufficient to use the name of the parish commonly used. *Rex v. Topsham*, 7 East, 466.

(c 4) *Form of,—statement of the medium of the settlement.*

The medium through which a party became settled need not be stated in an order of removal. An order, therefore, removing a married woman, not stating her to be such, to X, adjudging that to be her lawful settlement, is sufficient. It is her settlement because it is her husband's; but the cause why it is her settlement need not be stated. *Rex v. The Inhabitants of Ysptyty*, 4 M. & S. 52.

(c 5) *Form of,—of leaving the dates in blank.*

An order of removal dated the

day of April 1804, is good, though with a blank for the day of the month, or at least is helped by appeal to the sessions. *Rex v. Brimpton*, 2 Smith 277.

(c 6) *Form of,—statement of the examination, under 49 Geo. III, c. 124, s. 4.*

Before the statute 49 Geo. III, c. 124, s. 4, justices, making an order of removal, must have proceeded in all cases, except under the Mutiny Act, upon *virâ voce* evidence, taken before them in each other's presence. That statute enacts, that in case the pauper is by age or other infirmity, unable to be brought up to be examined as to his settlement, it shall be lawful for one magistrate to take his examination and report it to another, and for those magistrates, upon such report, to adjudge the settlement. Two justices made an order of removal, upon an examination taken in pursuance of this act, which order was in the usual form,—“upon the examination of C. D.” (the pauper,) without stating the special circumstances of that examination, and the report by the examining justice to the other. Held well, for the statute does not enjoin such statement. *Rex v. South Lynn, All Saints*, 4 M. & S. 354.

(c 7) *Form of,—in the case of a pregnant woman.*

1. It is sufficient that the order charge a woman, whether married or single (if pregnant with a child likely to be born a bastard) generally, as actually become chargeable to the parish, without setting forth the manner in which she has become so. *Rex v. Tibbendam*, 9 East, 388.

2. An order for the removal of a single woman, under 35 Geo. III, c. 101, stating that A. E, single woman, is, by being pregnant, deemed to have become chargeable to the said parish, &c. is good in form. *Rex v. Dibblebury*, 9 East, 398.

(c 8.) *Form of,—where a former order was quashed.*

If an order is quashed for a defect in form, it concludes nothing between the parishes which are parties to the decision, and consequently a second order need not set forth a fresh settlement, subsequent to the time when the first was made. *Rex v. St. Andrew's, Holborn*, 6 T. R. 613; *Rex v. Penge*, Nol. Rep. 176.

(c 9) *Form of,—miscellaneous.*

1. Where an order stated that the paupers "lately came and intruded themselves into the said parish," it was objected that it did not appear that the paupers were *then* in the parish, i.e. at the time of the removal. But held, that the order states, and the magistrates adjudge it to be true, that the paupers *are likely to become chargeable* to the parish, which could not be if they were not in the parish at the time. *Rex v. Binegar*, 7 East, 377; 3 Smith, 353.

2. It was objected against an order adjudging that the paupers *were* last legally settled in M, that this is no adjudication of a present settlement. But, "it refers to the time of the complaint made, and the court cannot intend an intermediate settlement between the hearing of the complaint, and the making of the order." *Rex v. Binegar*, 7 East, 377; 3 Smith, 353.

(c 10) *Nullity of,—from the nullity of the certificate on which it is founded.*

An order of removal under a certificate, not signed by a majority of the parish officers, is a nullity. *Rex v. The Inhabitants of Margam*, 1 T. R. 775.

(c 11) *Whether void, or voidable only,—from a defect in the signing.*

An order of removal, signed by two magistrates, away from each other, while one of them is out of his jurisdiction, renders the order only voidable upon appeal, and not absolutely void. *Rex v. Stotfold*, 4 T. R. 596.

(c 12) *Informality in, whether objectionable.*

An order may sometimes be quashed for a defect really formal, but which is so far considered as substance, that it cannot be amended under 5 Geo. II, c. 19. As for want of a proper adjudication of the pauper's last legal settlement. *Rex v. St. Andrew's, Holborn*, 6 T. R. 613.

(c 13) *Whether impugnable on grounds dehors.*

A husband, his wife and children, were removed by an order of justices to the place of their last settlement, and the order was suspended as to the husband, until it should appear that he was sufficiently recovered to be able to travel. The

husband dying, the wife and children were subsequently removed, without an order removing the suspension of the original order. The justices had likewise made a third order, which, after stating that the death of the husband had been proved, and that such charges had been incurred by the suspension, directed their payment. The orders being good on the face of them, cannot be quashed by the sessions. *Rex v. Englefield*, 13 East, 317.

(c 14) *Whether avoided by alteration.*

If an alteration is made in an order by one magistrate in the other's presence, after it is signed by both, and before delivery to the parish officers, although without being re-sealed and re-delivered, the order is not, therefore, bad. *Rex v. Llanwinio*, 4 T. R. 473.

(c 15) *Mode of impugning.*

It is not permitted to the parish against whom an order of removal operates, to shew it void by circumstances *dehors* the instrument itself, for they must in such a case, appeal in the regular course, or they are concluded. *Rex v. Stotfold*, 4 T. R. 596.

(c 16) *Defects in some parts, how aided by reference to others.*

1. Although a county is mentioned in the margin, it does not help the defect if two counties are mentioned in the body of the order, notwithstanding the magistrates describe themselves to be justices "in and for the said county." *Rex v. Moor Critchell*, 2 East, 66.

2. Where no county was mentioned in the margin of the order, and it was directed to the churchwardens and overseers of S. in the county of Middlesex, and to those of C. in Buckinghamshire, and the magistrates only stated themselves in the body of the order,—justices of the peace "for the county aforesaid," it was quashed. *Rex v. Stepney*, Burr. S. C. 23; *Rex v. Chilterscoton*, 8 T. R. 178.

(c 17) *Of amending and quashing the order.*

1. All averments necessary to show the magistrate's jurisdiction to make the order in question, are matters of substance, and cannot be amended under 5 Geo. II, c. 19. *Rex v. Chilterscoton*, 8 T. R. 178.

2. The sessions cannot make an order of removal; the validity, therefore, of such order, must depend upon its state

when issued by the justices; if then invalid, the sessions cannot amend it. *Rex v. The Inhabitants of Margam*, 1 T. R. 775.

3. Where an order is quashed generally, that must be taken to be upon the merits. *Rex v. St. Andrew's Holborn*, 6 T. R. 613.

4. The rule that the original order will be quashed, when that by which it is confirmed at sessions is quashed, does not hold where the merits of the appeal have not been properly tried at sessions, through the mistake or misconduct of that court,—here the court will direct the sessions to rehear the appeal. *Rex v. Yarpole*, 4 T. R. 71.

(c 18) *Proof of, where the order is lost.*

Parol evidence is sufficient where an order of removal is lost. *Rex v. Metheringham*, 6 T. R. 556.

(c 19) *Suspension of, under 35 Geo. III, c. 101.*

Justices have power, under 35 Geo. III, c. 101, s. 2, to suspend an order of removal, though the pauper was not, from special circumstances, actually brought before them. *Rex v. Ewerdon*, 9 East, 101.

(c 20) *Abandonment of, the consequence.*

If a parish obtain an order of removal, and then abandon it, consenting to take the pauper back, without giving the parish to whom it is directed the trouble of appealing, it concludes nothing. *Rex v. Diddlebury*, 12 East, 359.

(c 21) *On the removal of, by certiorari, after a case reserved and lapse of time.*

A certiorari will not be granted to remove an order of removal on a case reserved, after six months from order made by the sessions, or without six days notice. *Rex v. Justices of Sussex*, 1 M. & S. 631, 734.

(c 22) *Course of proceeding in K. B. on removal after confirmation by sessions.*

If an order of removal, confirmed by the sessions, is removed into the K. B. by certiorari, the court, if they see occasion, will direct the sessions to inquire into a fact. *Rex v. The Inhabitants of Margam*, 1 T. R. 775.

(c 23) *Levying of the charges of, under 35 Geo. III, c. 101, s. 2.*

The stat. 35 Geo. III, c. 101, s. 2, is peremptory upon the magistrates residing in jurisdiction where the levy is to be made, to endorse the warrant. *Rex v. Kynaston*, 1 East, 117.

(d) *Of the right to return notwithstanding.*

One removed from a parish under an order, may return, provided he does not return in a state of vagrancy. *Rex v. The Inhabitants of Fellongley*, 2 T. R. 709.

VII. OF THE SEVERAL SITUATIONS IN WHICH PERSONS ARE IRREMOVABLE, WITHOUT RELATION TO CERTIFICATES.

(a) *A resident on his own estate.*

(a 1) *General rule.*

Persons residing upon their own estate, howsoever acquired, or whatever the value, though actually chargeable, cannot be removed. *Rex v. Martley*, 5 East, 40; 1 Smith, 344.

(a 2) *An equitable estate.*

If a party has clearly an equitable estate, he shall not be removed from it. But the court must see clearly, that he has an equitable estate, which would be perfected in him by the intervention of a court of equity. *Rex v. Inhabitants of Standon*, 2 M. & S. 468.

(b) *A guardian.*

A guardian is entitled to reside irremovably upon the ward's estate. *Rex v. Inhabitants of Wilby*, 2 M. & S. 504.

(c) *From a franchise as a freeman.*

A person is not irremovable from a mere local privilege or franchise to which he is entitled as a freeman. *Rex v. Warkworth*, 1 M. & S. 473.

(d) *A Militia-man.*

A militia man having served his three years, is not, therefore, irremovable until he becomes chargeable under stat. 26 Geo. III, c. 107, s. 131; but only in case he exercises a trade. *Rex v. The Inhabitants of Gwenop*, 3 T. R. 133.

(e) *Casual poor.*

A day-labourer, settled in I, was employed to drive a load of hay from thence

to B, and return with a load of muck; in loading the muck he fell and broke his leg. Held, that he was to be considered casual poor, and not removeable under either 13 & 14 Car. II, c. 12; or 35 Geo. III, c. 101. *Rex v. St. James in Bury St. Edmunds*, 10 East, 25.

(f) *Liability to removal of either of the three relations mentioned in 43 Eliz. from the other having been relieved.*

By 43 Eliz. c. 2, s. 7, the father, son and grandson are reciprocally bound to maintain each other, if they are of sufficient ability. Hence, if they are not (or being so, have not been called upon by an order) no obligation is cast upon them; so that the parish, by relieving one, is not virtually relieving the others, and therefore cannot remove them as having become chargeable to the parish in which they are settled, and which has given them a certificate. *Rex v. The Inhabitants of St. Mary, Westport*, 3 T. R. 44.

(g) *A married woman, pregnant with a bastard:—Vide supra VI, (a 1).*

(h) *A pregnant single woman, in service:—Vide supra VI, (a 2)*

(i) *A wife by herself:—Vide supra VI, (a 3)*

(k) *A pauper removing from A. to B. for occasional relief.*

A pauper renting a house, and residing at I, from which parish she occasionally received relief; upon applying as usual for relief, was refused, and desired by the officers to go into F, in which some of her husband's relations had resided; and upon doing so, she was by the officers of F. refused relief, and sent back to I, when it was again denied her, and she was desired to apply once more to F, but expressing her unwillingness to do so, one of the overseers took her to F. without any order of removal, the officers of which latter parish relieved her, and threatened to send her to prison if she returned to I. The pauper was desirous of returning to her house at I, but owing to the threats of the officers of F, she remained there eight or ten days, when she was removed from thence to B. She was held removeable from either F. or I, to her proper parish. *Rex v. Birmingham*, 14 East, 251.

VIII. OF THE SEVERAL SITUATIONS IN WHICH PERSONS ARE IRREMOVABLE IN RELATION TO CERTIFICATES.

(a) *Residents under, whether irremovable.*
(a 1) *As likely to become chargeable.*

A certificated person cannot be removed until he has become *actually* chargeable; not because he is *likely* to become so. Hence, an unmarried woman pregnant was not therefore removeable. *Rex v. The Inhabitants of St. Mary Westport*, 3 T. R. 44.

(a 2) *In relation to 35 Geo. III, c. 101..*

The 35 Geo. III, c. 101, extends to pregnant single women residing under certificates. *Rex v. Great Yarmouth*, 8 T. R. 68.

(a 3) *To another than the certifying parish.*

The stat. 8 & 9 W. III, c. 30, does not prevent the removal of a certificated pauper to any parish other than the certifying parish in which, antecedent to the certificate, he may have acquired a settlement. *Rex v. Somersetshire*, 16 East, 303.

(b) *Nature of a certificate defined.*

A certificate is an indemnity from the parish from which, to the parish to which the pauper goes, against the consequences of permitting him to reside there. *Rex v. The Inhabitants of Newington*, 1 T. R. 356.

(c) *By whom grantable.*

(c 1) *Whether by a single overseer, where only one is appointed.*

A certificate signed and sealed by one overseer of a township, where one alone is appointed, is void. *Rex v. Clifton*, 2 East, 168.

(c 2) *Miscellaneous.*

1. A certificate signed by two churchwardens, one of whom was also appointed sole overseer in the same year, is a nullity. *Rex v. St. Margaret's, Leicester*, 8 East, 332.

2. *Seemle*, that where a township situate within a parish, has no churchwardens of its own, and maintains its poor separately, the churchwardens of the parish at large need not join with the overseers of the township in granting certificates. *Rex v. Clifton*, 2 East, 168.

(d) *Form of.*

(d 1) *Whether of its essence.*

A certificate derives its legal effect

from the stat. 8 & 9 W. III, c. 30, alone; if therefore, from the form in which it is couched, it cannot receive a construction suitable to that act, it is void. A certificate promising to receive the party back *when requested*, must be construed when *legally requested*, that is, on his becoming chargeable; for by that construction alone does it pursue the act. *Rex v. The Inhabitants of St. Mary Westport*, 3 T. R. 44.

(d 2) *In relation to the signature.*

1. A certificate not signed by a majority of the parish officers is an absolute nullity. *Rex v. The Inhabitants of Margam*, 1 T. R. 775.

2. A certificate must be signed by a majority of the parish officers, *de facto*, as contradistinguished from those *de jure*. *Rex v. Wymondham*, 6 T. R. 552.

(d 3) *In relation to the direction.*

A certificate need not be directed to any particular parish. *Rex v. Lillington*, 1 East, 438.

(d 4) *In relation to its extent.*

As it is competent to the parties to limit the extent of a certificate, it may be framed so as to exclude as well as to include a person who would otherwise be considered as protected by it. *Rex v. Storrington*, 7 T. R. 133.

(e) *Delivery of.*

1. A certificate takes effect only by delivery. *Rex v. Wensley*, 5 T. R. 154.

2. An apprentice may acquire a settlement in the certificated parish, where the master has received a certificate but not delivered it, if he reside forty days previous to the delivery. *Rex v. Wensley*, 5 T. R. 154.

(f) *Effect of.*

1. Wherever a certificate is not conclusive upon the parish granting it, to receive the party back again, it does not prevent him from acquiring a settlement there. *Rex v. Storrington*, 7 T. R. 133.

2. An apprentice, originally bound to a certificated man, does not acquire a settlement by serving part of his apprenticeship under a regular assignment to an uncertificated inhabitant of the parish. *Rex v. Hinckley*, 4 T. R. 371.

(g) *Construction of.*

(g 1) *In relation to the naming of children.*

A certificate to A. and B. his wife engaging to receive them, "their child or children, born or to be born," is not equivalent to a naming of the children in the certificate. *Rex v. Thwaites*, 1 M. & S. 669.

(h) *Extent of.*

1. Unless where a person is particularly described in a certificate, it only includes such as live under the same roof with the *pater familias*, and form part of his family. *Rex v. Darlington*, 4 T. R. 797; *Rex v. Mortlake*, 6 East, 397; 2 Smith, 530.

2. A certificate extends to three classes of persons:—1. Those actually named in it:—2. Those who are part of the person's family at the time it is granted:—3. Those who become so while he continues to reside under it. *Rex v. Storrington*, 7 T. R. 133.

3. If a certificate is granted when the woman is unmarried, and undertakes to provide for the child she is then pregnant with, and all other children that she may thereafter have, until she or they acquire subsequent settlements; it does not extend to an illegitimate child born eight years after the certificate is granted. *Rex v. Mathon*, 7 T. R. 362.

4. Wherever the master or mistress are protected in their residence by the certificate, either as the head or as a constituent part of a family, their apprentice or servant is prevented from acquiring a settlement in the parish by serving them in these capacities. *Rex v. Hampton*, 5 T. R. 266; *Rex v. Sowerby*, 2 East, 276.

(i) *Whether transferrable.*

A certificate is not a transferrable instrument from one parish to another. *Rex v. Wymondham*, 6 T. R. 552.

(k) *Continuance and determination of.*

(k 1) *General rules.*

1. A certificate only protects the certificated parish so long as the residence which commenced and was permitted under the faith of it continues. If the pauper quits the parish without any intention to return, such residence is at an end; *secus*, where he is absent for a temporary purpose only. *Rex v. The Inhabitants of Newington*, 1 T. R. 354.

2. If a party residing upon his own property in one parish receive a certifi-

cate of settlement from another parish, its effect is vacated by subsequent residence. *Rex v. The Inhabitants of Ufton*, 3 T. R. 251.

3. A certificate is discharged by the party's gaining a settlement in another parish, *Rex v. Great Torrington*, Burr. 428; although it is consolidated for the maintenance of the poor with the certificated parish. *Rex v. Wymondham*, 6 T. R. 552.

4. A certificate continues as to any person expressly named therein, until discharged by some act immediately affecting himself; for he is to be considered in the same situation as if the parish had granted a distinct certificate to him, *Rex v. Testerton*, 5 T. R. 258; and consequently his family reside under it and are affected by it. *Rex v. Bath Easton*, 8 T. R. 446.

5. A certificate is discharged by the pauper's voluntary deserting the certificate by removing from the parish to which it was granted, and taking up his residence either in the certifying parish or elsewhere, without an intention to return thither. *Rex v. St. Michael's in Coventry*, 5 T. R. 526.

6. If a parish grants a pauper a certificate, and on his removal from the certificated parish grants him another, the efficacy of the first certificate is annulled by the second. *Rex v. The Inhabitants of St. Peter in Derby*, 1 T. R. 218.

7. *Query*, Whether in the face of the Certificate Act, a certificate can be discharged by a voluntary gift? At all events, if money be paid or reserved upon the grant of land;—thus, 1*s.* fine, 1*s.* heriot, and 1*s.* rent, upon the grant of a copyhold; the transaction is a purchase, and not a gift; so that if it be under the value of 30*l.* it will not confer a settlement. A purchase is the acquisition of something for an equivalent; the smallness of the consideration, and that it is given in the form of a rent or future payment, cannot make it the less a purchase. *Rex v. The Inhabitants of Warblinton*, 1 T. R. 241.

(k 2) *In part.*

A certificate may be discharged altogether as to the entire family, or continued as to part, and determined as to the remainder. *Rex v. Heath*, 5 T. R. 583.

(k 3) *In relation to children, apprentices, and servants.*

1. A certificated person having returned to the certifying parish, and remained there eighteen years, a son who was born to him there, being hired and serving for a year in the parish certified to, gains a settlement in that parish. *Rex v. Frampton*, Dougl. 418.

2. If a child residing with his father, under a certificate, separates himself from the family, as by marrying, and taking a separate house, he ceases to be resident under the certificate; so that if he becomes chargeable, the certificated persons cannot be removed. *Rex v. The Inhabitants of St. Mary, Westport*, 3 T. R. 44.

3. A certificate is discharged as to those who reside under the general description of part of the family, by their ceasing to be so from becoming emancipated. *Rex v. Darlington*, 4 T. R. 797; *Rex v. Heath*, 5 T. R. 583; *Rex v. Mortlake*, 6 East, 397.

4. A certificate extends to all who are mentioned expressly, although they afterwards live away from their parent, and form the head of another family. *Rex v. Testerton*, 5 T. R. 258.

5. A man and his wife came into a parish under a certificate; the woman dying, the husband married again; and the second wife was held to reside under its protection after his death. *Rex v. Hampton*, 5 T. R. 266.

6. A pauper born in the parish where his father resided under a certificate, was put out apprentice there; his father died six months before the expiration of his apprenticeship; the certificate was not so determined as to enable the apprentice to acquire a settlement. *Rex v. Alfreton*, 7 T. R. 471.

7. The rule that a certificate is discharged, by the party's gaining a settlement in another parish, does not extend to acts of settlement done by minors, in the parish granting the certificate. They return to the certificated parish under the certificate, if the head of the family has continued to reside there under its protection. *Rex v. Ingworth*, 8 T. R. 339.

8. B. a pauper and his family came into a parish under a certificate, and had a son, W, born there, who quitted his father's family, married, and had children; and after the death of B, the son of W. was

bound apprentice to and served with him. He gained a settlement; for W. was removable, and not protected by the certificate. *Rex v. Mortlake*, 2 Smith, 530; 6 East, 397.

9. A pauper under age, apprenticed by his father to a certificated master in another parish, returning under age to his father's family, is not emancipated. *Rex v. Hardwick*, 11 East, 578.

10. A settlement acquired by the head of the family in the certificated parish, will be communicated to his unemancipated children, whether they are named in the certificate or not. *Rex v. Leek Wooton*, 16 East, 118; and see *Rex v. Hardwick*, 11 East, 578.

11. The statute 9 & 10 W. III, c. 11, provides, that "no person whatsoever who shall come into any parish by certificate, shall gain any settlement, unless he shall take a lease of a tenement, &c. or execute some annual office," &c. The child of a party resident in a parish under a certificate, but in which certificate the child is not named, is only incapacitated from gaining a settlement, so long as he remains a part of his father's family. On his coming of age, and separating himself from his father's family, that is, emancipating himself, he is competent, like others, to gain a settlement in the certificated parish. Not being named in the certificate, it can only operate upon him through the medium of his father, and as an accessory to and dependant upon him as a principal; the moment that connexion is lost, and his dependancy at an end, the influence from the father is at an end also. *Rex v. Inhabitants of Morley*, 2 M. & S. 417.

(l) Evidence relative to.

(1) Proof of.

1. The statute 3 Geo. II, c. 29, passed for facilitating the proof of certificates of settlement, does not take away the common-law mode of proof, but only dispenses with it in the election of the party. Therefore a certificate thirty years old must be received in evidence without further proof, though there is none or an insufficient certificate of the justices who allowed it, of the deposition required by that act. *Rex v. The Inhabitants of Farringdon*, 2 T. R. 466.

2. The production of the certificate is

not sufficient evidence, under 33 Geo. III, c. 54, without proof of its having been delivered to the parish officers. *Rex v. Egremont*, 14 East, 253.

3. On a question of settlement, where the respondents produced a certificate more than thirty years old, which had been granted to their parish by the appellant parish; held, that the mere production of it was sufficient, and that the respondents were not obliged to shew that the certificate had been kept in the parish chest. *Rex v. Inhabitants of Ryton*, 5 T. R. 259.

(12) Admissibility of evidence in explanation of.

Evidence to explain, without contradicting a certificate of settlement, is admissible; thus, to shew that those who signed it, though described as officers of the parish at large, were officers of a hamlet of the parish, which hamlet maintained its own poor separately, and in which the certificated person was acknowledged in the certificate to be settled. *Rex v. The Inhabitants of Samborn*, 3 T. R. 609.

(13) Proof of its having been discharged, on whom thrown.

The onus of proving that a certificate has been discharged, is thrown upon the parish who wish to get rid of it. *Rex v. The Inhabitants of Warblinton*, 1 T. R. 241.

(m) Whether conclusive against the certifying parish, as to its contents.

1. A certificate concludes the parish which gave it from controverting any fact which is there set forth, only as against the parish to whom it is given, though it is *prima facie* evidence for others. *Rex v. Lubbenham*, 4 T. R. 251.

2. A parish having granted a certificate, in which it acknowledges the parties to be man and wife, is estopped from afterwards disputing the fact or validity of the marriage. *Rex v. Ullesthorpe*, 6 T. R. 465.

(n) Certificate of allowance of, under 3 Geo. II, c. 29.

(n 1) Its form.

Quere, whether a certificate by the justices, allowing a certificate of settlement, that it was first proved to be duly executed, as the statute directs, is a suf-

sufficient certificate under 3 Geo. II, c. 29; or whether the particular facts deposed to should not be detailed? If they should, then *quære*, whether such certificate, written in the margin of the instrument, can be connected with an indorsement thereon detailing those facts at length, so as to make the two one act? *Rex v. The Inhabitants of Farringdon*, 2 T. R. 466.

IX. RELATIVE TO APPEALS.

(a) In general.

(a 1) Whether may be made to an adjourned sessions.

As an adjournment is a continuance of the original sessions, an appeal may be lodged at an adjournment of the next sessions, as well as their original commencement, where they are adjourned from one place to another for public convenience. *Rex v. Justices of Sussex*, 7 T. R. 107.

(a 2) Adjournment of,—entry of continuances thereon.

If an appeal is respited from one sessions to the next, the continuance by a proper adjournment should be entered. *Rex v. Yarpole*, 4 T. R. 71.

(a 3) Mandamus to hear,—course of proceeding thereon.

Where a *mandamus* is granted to receive and hear an appeal, it is necessary that the sessions should enter the appeal as of the sessions, when it ought to have been presented, and continue their jurisdiction by fictitious entries of adjournment from that session until the sessions at which it is heard. *Rex v. Justices of Buckinghamshire*, 3 East, 342; *Rex v. Yarpole*, 4 T. R. 71.

(a 4) Relative to costs.

The quarter sessions have no authority to award costs, under 17 Geo. II, c. 38, unless an appeal has been entered and determined. *Rex v. Justices of Essex*, 8 T. R. 583.

(b) Of the appeal against a poor's rate.

(b 1) To what sessions made in point of time.

The party is held to be aggrieved, within the meaning of the statute, by making the rate. He must, therefore, appeal to the next sessions after allowance and publication, and cannot lie by until

called upon to pay the assessment of which he complains. *Rex v. Athins*, 4 T. R. 12.

(b 2) To what sessions made, in point of jurisdiction.

The appeal must be made to the general quarter sessions, notwithstanding the intervention of a general sessions. *Rex v. Justices of London*, 15 East, 632.

(b 3) Notice of appeal,—duration of.

One intervening day between the publication of the rate and the next immediate quarter sessions, is not sufficient notice of appeal. *Rex v. Justices of Sussex*, 15 East, 206.

(b 4) Notice of appeal,—joinder of parties therein.

Where the cause of appeal was the omission of certain persons in the rate, held, that several might join in one notice of appeal. *Rex v. Justices of Sussex*, 15 East, 206.

(b 5) Notice of appeal,—to whom given.

On an appeal against a rate, on the ground that the name of a party liable to be rated has been omitted, notice to such party need not be given. The stat. 17 Geo. II, c. 38, only requires notice to be given to the churchwardens or overseers. *Rex v. The Parish Officers of Mad-dern*, 1 T. R. 625.

(b 6) Of the evidence thereon.

Since on an appeal against a poor's-rate, the respondents must begin by proving their case; on their admitting that the rate was made under a certain private act, the sessions may receive as evidence a copy of that act produced by the appellant without further proof, and it is for the respondent to prove that the provisions of the act are different. *Rex v. Shaw*, 12 East, 479.

(b 7) Of the practice on the hearing.

1. Personal property is not to be rated at random, and the party left to get off as he can; but the officer making the rate must be able to support what he has done by evidence. *Rex v. White*, 4 T. R. 771.

2. In an appeal against a poor's rate, if the ground of complaint be, that the appellant has no rateable property in the parish, the counsel for the respondent

begins to establish possession of some property in the appellant, for which he is liable to be rated, before the other side is called upon to refute it. *Rex v. Newbury*, 4 T. R. 475. So in an appeal against an order of filiation. *Rex v. Knill*, 12 East, 50.

3. When the question before the sessions is upon the quantum of the rate, the officers making it must shew to the justices some probable ground for the amount at which they charge the party in the rate. *Rex v. Topham*, 12 East, 546.

(b 8) *Of the judgment,—who are excluded from joining therein.*

In giving judgment, those justices who are rated or rateable for that parish or place whose interest may be affected by the judgment, have no right to vote. *Rex v. Yarpole*, 4 T. R. 71; 2 Bott. 708, pl. 777.

(b 9) *Of the jurisdiction of the sessions to make a new rate.*

Magistrates, upon an appeal from a rate to the quarter sessions, cannot make a new, but only quash the subsisting rate. *Rex v. St. Andrew's, Holborn*, 3 Burr. 1458.

(b 10) *Neglect to appeal, the consequences.*

1. A party, by neglecting to appeal against a rate to the next sessions, is estopped from afterwards disputing its validity. *Durrant v. Boys*, 6 T. R. 580.

2. If a person be rated for stock in trade, and virtually submits to his assessment by not appealing against the rate, it is *prima facie* evidence that he is assessable in the ensuing year to the like amount. *Rex v. Darlington*, 6 T. R. 468; see also *Rex v. Brograve*, 4 Burr. 2491.

(c) *Of the appeal against an order of removal.*

(c 1) *To what sessions made,—in point of jurisdiction.*

The appeal must be to the first original quarter sessions, after the party is aggrieved; and where a sessions commences before the cause of complaint arrives, and is afterwards continued by adjournment, the appeal should be entered at the ensuing sessions, and not at such adjournment. *Rex v. Justices of Sussex*, 7 T. R. 107.

(c 2) *To what sessions made,—in point of time.*

1. Where an appeal against an order of removal might have been entered at the next sessions, it cannot be received at a subsequent one; if there is not sufficient time before those sessions to give reasonable notice of appeal, it may be entered and adjourned pursuant to st. 9 Geo. I. c. 7, s. 8. *Rex v. The Justices of Herefordshire*, 3 T. R. 504.

2. If the parish to which a pauper has been removed, is at such a distance that there is not time to lodge an appeal at the quarter sessions, immediately subsequent to the removal, the justices are bound to receive it at the sessions next ensuing. *Rex v. Justices E. R. of Yorkshire*, Dougl. 192.

3. An order of removal from a township in the West Riding of Yorkshire, to a parish in Middlesex, is executed on the 12th instant, and the Epiphany sessions for the West Riding are held on the 18th instant. The parish neglect to appeal at this sessions, but offer their appeal at the next, which the justices refuse to receive. Upon an application for a *mandamus*, the court of K. B. held, that the parish were in strictness bound to have appealed at the Epiphany sessions; but that in consideration of the distance, had they been ready to have not only entered but to have tried their appeal at the sessions following, they would have relieved them; now it appeared that they were only ready to enter and respite; so they refused the *mandamus*. *Rex v. Justices of West Riding of York*, 4 M. & S. 327.

(c 3) *At what period of the sessions made.*

The sessions are bound to receive an appeal presented at any time during the next sessions after the order of removal made. *Rex v. Justices of Leicester*, 1 East, 686.

(c 4) *Notice of appeal,—how far necessary.*

1. The justices are bound to receive an appeal from an order of removal, if tendered at the next quarter sessions, although no notice of an appeal has been given. *Rex v. Justices of Gloucestershire*, Dougl. 191.

2. The st. 9 Geo. I. c. 7, s. 8, is peremptory upon the justices to hear an appeal, and it cannot be dismissed on the

ground that notice had not been given to the respondents. *Rex v. Justices of Staffordshire*, 3 Smith, 555; 7 East, 549.

(c 5) *Notice of appeal,—by whom given.*

The st. 9 Geo. I, c. 7, s. 8, speaking of the time of notice to be given of appeals from orders of removal, says, that no appeal shall be proceeded on, unless reasonable notice be given by the churchwardens and overseers of the parish appealing, unto the churchwardens and overseers of the other parish. Notice by a majority of those officers is sufficient. *Rex v. Beeston*, 3 T. R. 595.

(c 6) *Evidence thereon,—general rule.*

After proof by the respondent parish, that the pauper was once settled in the appellant parish, it lies upon the latter to shew that he has acquired a subsequent settlement. *Rex v. The Inhabitants of Bucklebury*, 1 T. R. 164.

(c 7) *Evidence thereon,—for the respondents,—degree of.*

Upon an appeal against an order of removal of a married woman, the settlement of the husband was proved by the respondents, by his mother, and he, though in this country, was not called. Upon an objection that the son's testimony was the best evidence, it was held that the evidence was sufficient. The respondent parish need only launch a *prima facie* case of settlement. *Rex v. Inhabitants of Ysptyty*, 4 M. & S. 52.

(c 8) *Adjournment of.*

1. By st. 9 Geo. I, c. 7, s. 8, "the justices at the sessions shall, if it appear to them that reasonable notice of an order of removal was not given, adjourn the appeal to the next quarter sessions." Whether reasonable notice has been given, they are the sole judges, and therefore, may refuse to receive an appeal offered to be lodged upon condition that they would adjourn, since such a motion is in effect to adjourn the appeal. *Rex v. The Justices of The North Riding of Yorkshire*, 3 T. R. 150; *Rex v. Justices of Derbyshire*, 4 T. R. 488; see 5 T. R. 188.

2. Where the respondents at the hearing object to the reasonableness of the notice, the sessions must adjourn the appeal. *Rex v. Justices of Buckinghamshire*, 3 East, 342.

(c 9) *In relation to 35 Geo. III, c. 101.*

Under 35 Geo. III, c. 101, s. 2, an appeal lies against an order of removal which was suspended, and against a subsequent order for costs, notwithstanding the pauper's death prior to her removal, and though the costs are under 20 l. *Rex v. St. Mary-le-Bone*, 13 East, 51.

(d) *Of the appeal under stat. 49 Geo. III, c. 101, s. 3.*

(d 1) *To what sessions made,—in point of time.*

The party may bring the appeal under 49 Geo. III, c. 101, s. 3, within the time allowed by law for bringing appeals against orders of removals, and is not limited to three days after the costs are demanded. *Rex v. Bradford*, 9 East, 97.

(e) *Of the appeal against an order of relief.*

(e 1) *Whether maintainable.*

An appeal against an order of justices for the relief of a pauper, does not lie to the quarter sessions; such course would divert the funds intended for the relief of the poor, into other channels. If the order be mistaken, the error should be pointed out to the justice, and he be required to amend it. *Rex v. Justices of Devon*, 4 M. & S. 421; *Rex v. North Shields*, Dougl. 331.

(f) *Of the appeal against an appointment of overseers.*

(f 1) *Who may appeal.*

The stat. 43 Eliz. c. 2, enacts, that "if any person shall find himself aggrieved, &c. he may appeal," &c. Since the words are sufficiently extensive, and there is no reason for restraining their import, as well parishioners as overseers may appeal against an appointment of overseers of the poor. *Rex v. Forrest*, 3 T. R. 38.

(g) *Of the appeal against overseers' accounts.*

(g 1) *Form of.*

On an appeal against the overseer's accounts, the appellant must, under 41 Geo. III, c. 23, state his objections specially to each item. *Rex v. Hill*, 1 Smith, 508.

(g 2) *To what sessions made, in point of time.*

When overseers' accounts were verified and allowed, 8th July being the last day

permitted by the practice of the sessions for giving notice of appeal to the next ensuing sessions, holden in July, B., an inhabitant, appealed to the subsequent sessions holden in October. Held in time. *Rex v. Justices of Dorsetshire*, 15 East, 300.

X. RELATIVE TO OVERSEERS OF THE POOR, AND HEREIN OF THE LOCAL DIVISIONS BY WHICH THE POOR ARE TO BE MAINTAINED.

(a) *Of the local limits for which overseers are to be appointed.*

(a 1) *General rule.*

Under the words of the act, overseers can only be appointed for a place which is either actually or by reputation a vill or township. *Rex v. Showler & Atter*, 3 Burr. 1391; or an hamlet which in common acceptation is considered as synonymous. *Rex v. Morris*, 4 T. R. 550.

(a 2) *Vills.*

1. To divide a parish into districts, two things are necessary: 1. It should consist of two or more distinct vill or townships: 2. It must appear that the parish cannot otherwise conveniently enjoy the benefit of 43 Eliz. c. 2. *Peart v. Westgarth*, 3 Burr. 1610; *Rex v. Newell*, 4 T. R. 266.

2. The meaning of the phrase, that a parish cannot have the benefit of the statute 43 Eliz. c. 2, is, that it is not possible, but inconvenient for them to maintain their own poor collectively. *Rex v. The Inhabitants of Leigh*, 3 T. R. 748.

3. Where a parish consisting of several townships, is not entitled, under st. 43 Eliz. to have its poor maintained by the whole collectively, each township has a right separately to maintain its own poor and appoint its own overseer. *Rex v. Sir Watts Horton*, 1 T. R. 374.

4. Where a parish consisting of several townships is entitled to have more than four overseers, the number allowed under st. 43 Eliz., as where from its extent and population four are not sufficient, it cannot claim the benefit of that act, namely, to have its poor maintained, and overseers appointed jointly by the whole parish. *Rex v. Sir Watts Horton*, 1 T. R. 374.

5. If one or more townships in the same parish are already separated, and provide for their own poor separately, it proves decisively that the parish cannot maintain their poor as a parish. *Rex v. Horton*,

1 T. R. 374. Another material ingredient to establish this point, although it is not so decisive a criterion, is the customary appointment of more than four overseers. *Rex v. Newell*, 4 T. R. 266.

6. Though it should appear that a parish had enjoyed the benefit of the st. 43 Eliz. c. 2, yet if they cannot now conveniently maintain their own poor jointly, they will be allowed to divide themselves, provided there are such legal divisions in the parish as are capable of supporting their own poor separately, under the st. 13 & 14 Car. II. c. 12. *Rex v. The Inhabitants of Leigh*, 3 T. R. 746.

7. If it appear, without any evidence to the contrary, that a township has for a length of time maintained its own poor separately, this is a proof that the parish at some former period could not have the benefit of the st. 43 Eliz. c. 2; which is sufficient to continue the same privilege to the township, notwithstanding, from a change of circumstances, it may not now be inconvenient for the parish to maintain its own poor collectively. *Rex v. The Inhabitants of Leigh*, 3 T. R. 746.

(a 3) *Parishes.*

1. That a parish consisting of several townships should be entitled, under st. 43 Eliz. to have its poor maintained by the whole collectively, and thus have overseers appointed jointly for the whole, it is necessary that the right of compelling the entire parish to join should exist; which cannot be the case where any one township is entitled to maintain its own poor and appoint its own overseer separately from the rest. A parish can only act as such where all its parts are united. *Rex v. Sir Watts Horton*, 1 T. R. 374.

2. The parish of St. Giles, Reading, consists of one district situate within the borough of Reading, and of another situate within the hamlet of Whitney, which lies without it. There is but one church, but the hamlet had a constable and churchwardens from time immemorial, and separate overseers from 1648. These districts made separate rates as far back as evidence went; but in conformity to an order of sessions made in 1649, one of them paid three-eighths and the other five-eighths parts to the whole expenses of the poor of both parts of the parish, the whole expenses, when incurred, being computed

into one integral sum. The overseers for each, after relieving their own poor, accounted with the other reciprocally for any surplus or deficiency in their proportion. The overseers for W. relieved their own poor separately, and kept separate accounts, which were separately allowed by two justices. Certificates had been granted by W., and other parishes had removed paupers thither and received them thence, but this did not appear to have taken place as between the hamlet and the rest of the parish. For several years the poor had been jointly maintained in a poor house, to which the hamlet and borough part of the parish contributed in the stipulated proportion of five to three, and the inhabitants of the hamlet have constantly attended the vestry meetings of the parish. The inference is, that they may reap the benefit of the statute. *Rex v. Newell*, 4 T. R. 266.

3. Where several districts of a parish lying in several counties, by agreement unite in appointing overseers for upwards of thirty years, a rate made for the whole parish will be valid, they having substantially the benefit of 43 Eliz. c. 2. *Lane v. Cobham*, 3 Smith, 1; 7 East, 1.

4. The word "cannot," in 13 & 14 Car. II, must be read "may not," and the words "shall after the passing of this act be maintained," &c. must be understood not merely as imperative in respect to the then existing cases, but as applicable to other parishes also, which in future might be similarly circumstanced; and as ceasing to be imperative when any parish might reap the benefit of 43 Eliz. c. 2. *Rex v. Palmer*, 8 East, 416.

(b) *Who are eligible to the office.*

(b 1) *In relation to his estate.*

The qualification for an overseer of the poor, required by the statute 43 Eliz. c. 2, is, that he be a *substantial* householder. The word *substantial*, is a relative term, so that a poor labourer may be nominated where there are none more wealthy than himself within the district. *Rex v. Stubbs*, 2 T. R. 395.

(b 2) *A churchwarden.*

A churchwarden cannot be chosen an overseer for the same parish, during his continuance in office. *Rex v. All Saints, Derby*, 13 East, 143.

(b 3) *A woman.*

A woman may be an overseer of the poor. There is nothing in the nature of the office which incapacitates her from serving it; and by the statute 43 Eliz. c. 2, the only qualification required for an overseer, is, that he be a substantial householder, a term which has no reference to sex. *Rex v. Stubbs*, 2 T. R. 395.

(c) *Of exemptions from serving the office.*

(c 1) *By grant of the crown.*

The crown may exempt an officer of the customs from serving the office of overseer of the poor. *Rex v. Warner*, 8 T. R. 375.

(c 2) *Writ of privilege,—whether essential to the exemption of a custom-house officer.*

An officer of the customs, though he have not his writ of privilege at the time of his appointment, is exempt from serving the office of overseer of the poor. *Rex v. Warner*, 8 T. R. 375.

(d) *On the appointment of.*

(d 1) *When made,—whether allowable on a Sunday.*

An appointment of overseers made on a Sunday was quashed. *Rex v. Overseers of Bridgewater*, Cowp. 139.

(d 2) *Form of,—whether by separate instruments.*

Though there must be more than one overseer, yet the appointment need not be by one and the same instrument. *Rex v. Morris*, 4 T. R. 550.

(d 3) *Form of,—in relation to signing and sealing.*

The justices in the appointment of overseers, presented by the parishioners, are to exercise a discretion, and the result of their conference is to be the ground of their determination. Therefore, they cannot sign or seal the appointment separately. *Rex v. Forrest*, 3 T. R. 38; *Rex v. Great Marlow*, 2 East, 244.

(d 4) *Form of,—in relation to its duration.*

An appointment of overseers of the poor, dated in October, "for one year next ensuing the date hereof," is valid, since it shall be taken to mean the overseer's year. *Rex v. Stubbs*, 2 T. R. 395.

(d 5) *Form of,—whether controllable by usage.*

An usage in the appointment of overseers of the poor, in contradiction to the mode prescribed by stat. 43 Eliz. c. 2, is void. *Rex v. Forrest*, 3 T. R. 38.

(d 6) *Form of,—when for sub-divisions.*

The appointment of overseers for the subdivisions of a parish is void, unless it expressly appear that the parish could not reap the benefit of 43 Eliz. c. 2. *Rex v. Uttoreter*, Dougl. 346.

(d 7) *In relation to 13 Geo. III, c. 78, s. 1.*

The stat. 13 Geo. III, c. 78, s. 1, does not prevent an appointment of overseers after the period prescribed by the act, if necessary. *Rex v. Justices of Denbyshire*, 4 East, 142.

(d 8) *Appointment of a single overseer,—whether ex facie null.*

Though there must be more than one overseer for a township, yet an appointment of one is not bad on the face of it, or unless it appears that no other is appointed by some other order. *Rex v. Morris*, 4 T. R. 550; *Rex v. Besland*, 1 Bott. 17, pl. 34; *Rex v. Clifton*, 2 East, 168.

(d 9) *Revision of.*

When an appointment of overseers is once legally made, the magistrates are *functi officio*. *Rex v. Great Marlow*, 2 East, 244.

(d 10) *Jurisdiction of magistrates over.*

Other magistrates are not only disabled from making a new appointment of overseers, *Rex v. Searle*, 1 Bott. 21, pl. 37; *Rex v. Merchant*, 1b. 25, pl. 43;—if a person who has been appointed applies to them to be exempted upon sufficient cause, they cannot remove him and substitute another in his place, but he must appeal to the sessions for his discharge. *Rex v. Great Marlow*, 2 East, 244.

(d 11) *Whether objectionable,—by matter dehors.*

K. B. will quash the appointment of overseers not only for such defects as appear on the face of the order, but upon a sufficient statement of facts disclosed by affidavit. *Rex v. Great Marlow*, 2 East, 244.

(d 12) *How corrected.*

An appeal to the sessions against an order of justices appointing overseers of the poor, is not the only mode of redress. It may also be removed into the court of K. B. by *certiorari*, and quashed if defective, as where the place in respect of which the appointment is made is not a vill. The fact whether it be so or not, will be tried by affidavits (in support of, and against the rule for quashing the order). *Rex v. Inhabitants of Standard Hill*, 4 M. & S. 378.

(e) *Extent of their office defined,—when acting by consent within separate limits.*

Where particular overseers act for their own convenience, each in particular districts in the parish, they are nevertheless overseers for the whole parish. *Rex v. Newell*, 4 T. R. 266; *Id.* 462.

(f) *Minority bound by the majority.*

Where the poor laws require acts to be done by churchwardens and overseers, a majority of those officers may in general bind the rest. *Rex v. Beeston*, 3 T. R. 592.

(g) *Of contracts by, under 9 Geo. I,—union of all, whether essential.*

The stat. 9 Geo. I, c. 7, s. 4, enables the churchwardens and overseers of the poor of any parish, with the consent of the major part of the parishioners or inhabitants in vestry assembled, &c. to contract. A majority of those officers may bind the rest. *Rex v. Beeston*, 3 T. R. 592.

(h) *Of their right to remuneration for their services.*

An overseer of the poor is not entitled to be paid a salary for his services. *Rex v. Glyde*, 2 M. & S. 323.

(i) *Disbursements of, how recouped.*

1. A rate cannot be made to reimburse an overseer money advanced for the parish. Dougl. 117.

2. If an officer continues in office for successive years, he cannot reimburse himself the outlays of former years by a rate made in the last, although the rates made in antecedent years, were either quashed on appeal, or could not be collected as being informal. *Rex v. Goodcheaf*, 6 T. R. 159.

(k) *Liability of, for medical attendance.*

1. A surgeon attends a pauper for some time, giving credit to the pauper's father for payment of his bill, but he becoming unable to pay, and the pauper still continuing ill, the surgeon applies to the overseers of the poor to know whether he shall continue his attendance at their expense; they say they will give no authority, but if he brings in a reasonable bill they will see it paid. Held, that the attendance of the surgeon being divisible he might recover for the latter attendances on the credit of the overseers, without proving a promise in writing. *Lyde v. Higgins*, 1 Smith, 305.

2. If a surgeon employed to attend the poor of a parish, attends casual poor within the knowledge of the overseer, the overseer must be taken to have assented; from which assent a previous request may be implied, and thus the overseer be made liable for his bill. *Lamb v. Bunce*, 4 M. & S. 275.

(l) *Payment of a balance due from, how enforced.*

1. Where, upon appeal, the sessions find a balance due from an overseer, but do not proceed to direct by their order that he pay it over to the succeeding overseers, application may be made to two justices, out of sessions, to enforce payment. *Rex v. Carter*, 4 T. R. 246.

2. The stat. 50 Geo. III, c. 49, enacts, that in case the late churchwardens and overseers, or any of them, shall refuse to pay over the balance, &c. it shall and may be lawful for the subsequent churchwardens and overseers, by warrant from any two or more justices, to levy all such sums, &c. One of three parish officers, though the other two dissent, may require a warrant under this statute. To interpret the meaning of the statute to be, that the whole, or at least a majority, of the overseers, must join in the requisition, would have the effect of suspending the statute, for such would be the consequence of a dissent by any one. *Rex v. Pascoe*, 2 M. & S. 343.

(m) *Of overseers' accounts,—audit of, in relation to 50 Geo. III, c. 49.*

The provision in 50 Geo. III, c. 49, is not in substitution of, but cumulative to that in 17 Geo. II, c. 38. *Lester's case*, 16 East, 374.

VOL. II.

(n) *Of overseers' accounts,—construction of an order confirming.*

There is an appeal against overseers' accounts; whereupon the sessions made an order confirming the accounts. The form of the order is as follows:—it recites that the appellant objected to such and such charges upon such and such grounds; and then orders that the said accounts be confirmed. Now, if the charges were made upon the grounds objected, they were clearly bad. But the question is; whether we are to suppose that the sessions heard evidence to shew that those were not the grounds of the charges, or whether they did not, but taking for granted that the grounds objected, were the real grounds, meant by their confirmation to say that they were allowable and sufficient. Held, that the latter must be the construction of the order. [It was stated, however, to the court of K. B. to which the order had been removed by *certiorari*, that the grounds objected were not the real grounds of the charges; whereupon the court quashed the order, and remitted the case to the sessions to re-hear the appeal.] *Rex v. Glyde*, 2 M. & S. 323.

(o) *Of the rights of succeeding overseers,—to maintain ejectment.*

Succeeding overseers cannot support ejectment on the title of their predecessors. *Doc. ex dem. Grundy, v. Clarke*, 14 East, 488.

(p) *Of the enforcement of complaints by, on refusal by magistrates to entertain them.*

If magistrates refuse to entertain the overseers' complaint of non-payment of a poor's rate, a *mandamus* lies to compel them, *Rex v. Benn*, 6 T. R. 198; or a criminal information where they have corruptly refused. *Rex v. Cozens*, Dougl. 426.

(q) *Of the enforcement of complaints against, on refusal by magistrates to entertain them.*

If justices decline to receive, and proceed upon a complaint against an overseer for refusing to pay over the balance in his hands, the K. B. will compel them by *mandamus*. *Rex v. Carter*, 4 T. R. 446.

K

(r) *Indictment for refusing the office.*(r 1) *Form of.*

An indictment that the defendant was appointed overseer of the poor of the parish of X, for one year then next ensuing; and that he refused to take upon himself the execution of the said office of overseer of the same parish, is sufficient; since, 1. the appointment "for the year then next ensuing," means the overseer's year; 2. the "said office of overseer," appears, by reference to preceding matter, to mean office of overseer of the poor. *Rex v. Burder*, 4 T. R. 778.

XI. MISCELLANEOUS.

(a) *Construction of an order to receive the profits of a pauper's estate.*

Two justices, by order under 5 Geo. I, c. 8, s. 1, directed the overseers, &c. to receive the annual rents and profits of the lands and tenements of A, a pauper who had run away from his family, and to certify to the next sessions, &c.; the sessions confirmed the said order, and directed them to receive the sum of 7*l.* 16*s.* rent, of the rents and profits of the lands of A. These orders extend only to one specific sum of 7*l.* 16*s.* and do not authorize the seizing of the annual profits from time to time. *Stable v. Dixon*, 2 Smith, 278; 6 East, 186.

PORTSMOUTH.

I. RELATIVE TO THE TOWN OF.

a) *Statutes relative to.*

(a 1) 14 Geo. II, c. 43, p. 774.

II. RELATIVE TO THE CORPORATION OF.

(a) *Corporate assembly of.*(a 1) *How constituted*, p. 774.(b) *Alderman of.*(b 1) *Qualification as*, p. 774.(c) *Burgess of.*(c 1) *Infancy, whether disqualifies for being*, p. 774.

I. RELATIVE TO THE TOWN OF.

(a) *Statutes relative to.*

(a 1) 14 Geo. II, c. 43.

1. The private act 14 Geo. II, c. 43, is not annulled by stat. 32 Geo. III, c. 103. *Goldson v. Buck*, 15 East, 372.

2. The powers and consequent rights conferred by the private stat. 14 Geo. II, c. 43, on the persons therein named, were not annexed to his character as lord of the manor. *Goldson v. Buck*, 15 East, 372.

II. RELATIVE TO THE CORPORATION OF.

(a) *Corporate assembly of.*(a 1) *How constituted.*

The majority of mayor and aldermen for the time being is sufficient to constitute the corporate assembly of Portsmouth. *Rex v. Monday*, Cowp. 530.

(b) *Alderman of.*(b 1) *Qualification as.*

Residence is not a precedent qualification for a burgess of Portsmouth to entitle him to be elected alderman. *Rex v. Monday*, Cowp. 530.

(c) *Burgess of.*(c 1) *Infancy, whether disqualifies for being.*

An infant cannot be elected a burgess of Portsmouth, though not sworn in till of age. *Rex v. Carter*, Cowp. 226.

PORTUGAL.

(a) *Treaty with.*(a 1) *Construction of.*

Construction of the 5th article of the treaty between Great Britain and Portugal. *Cohen v. Hannam*, 5 Taunt. 101.

POST-HORSE ACT.

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(a) *Defined*, p. 775.(b) *On whom imposed*, p. 775.(c) *How payable.*(c 1) *Whether by the day or mile*, p. 775.

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- (a) *For not delivering a list.*
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- (a) *For delivering a false account.*
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(c) *Compounding of,* p. 776.
(d) *Supra, I. (a).*

I. DUTIES UNDER.

- (a) *Defined.*

The Post-Horse Act, 25 Geo. III, c. 26, only requires the post-masters, &c. in making up their accounts, to insert therein the number of horses let, and the number of miles, &c. but does not require the amount of the duties received to be specified. A declaration, therefore, on this statute by the farmer of the duties against a post-master, charging the defendant with having made false accounts, "in not inserting in the account the sums of money received by him," charges no offence, and is therefore bad after verdict. *Radford v. McIntosh*, 3 T. R. 632; *Radford v. Briggs*, Id. 637.

- (b) *On whom imposed.*

By the stat. 25 Geo. III, c. 51, the commissioners of stamps are authorized to appoint under them collectors of post-horse duties: By stat. 27 Geo. III, c. 26, reciting the former act, these duties are to be let to farm; the farmer is to be appointed under seal, collector of the duties; and certain obligations thrown by stat. 25 Geo. III, c. 51, on another class of persons, are by this act cast upon "the person farming the duties, and appointed collector thereof." In an action for a breach of these obligations, the declaration averred that the defendant was a collector of the duties recited in stat. 27 Geo. III, c. 26. The judgment was arrested, since *non constat* that he was the farmer of the duties, or any more than a collector appointed under the first act, and therefore that the obligations in question were not thrown upon him; nor was the defect cured by verdict,

since the declaration shewed no title whatever. *Short v. Pruett*, 6 T. R. 163.

- (c) *How payable.*

- (c 1) *Whether by the day or mile.*

By stat. 44 Geo. III, c. 98, where the distance is ascertained, though the hiring be for a day, the duty is payable by the mile; if not ascertained, by the day. *Sargeant v. White*, 11 East, 530.

II. CONSTRUCTION OF.

- (a) *A letting to hire within, what is or is not.*

- (a 1) *In general.*

1. If a letting to hire be in its nature a hiring to travel post, within the stat. 25 Geo. III, c. 51, it makes no difference that the owner of the horse rides it himself. *Rex v. Webber*, 3 T. R. 72.

2. The words "travelling post," used by the stat. 25 Geo. III, c. 51, must be received in their popular sense; therefore, a neighbour who lets a horse to go from one town to another, and return, within the compass of a day's journey, is not liable to the penalty imposed by that act for not taking out a license. *Rex v. Tooley*, 3 T. R. 69. See *Rex v. Swift*, 8 East, 584, n.

3. Letting a horse to hire to carry a private express, that is, one not sent by government on public service, is a hiring to travel post within the stat. 25 Geo. III, c. 51. *Rex v. Webber*, 3 T. R. 72.

4. The letting of a horse to hire to carry a government express, is not a letting to hire within the meaning of the Post-Horse Act of 25 Geo. III, c. 51. *Rex v. Cook*, 3 T. R. 519.

5. Under schedule B. of stat. 44 Geo. III, c. 98, the duty is laid on every horse hired by the mile, or stage, whether or not for travelling post. *Welford v. Todd*, 8 East, 580; *Rex v. Swift*, Id. 584, n., S. P. on stat. 25 Geo. III, c. 51.

6. A letting to hire a horse to go a certain stage, and back again, within the day, requires a license under schedule A. stat. 44 Geo. III, c. 98. *Hanley v. Cubberley*, 15 East, 257.

7. The sense of the word "travelling," as used in the Post-Horse Acts, must be limited to cases where a *traveller* is conveyed; therefore the letting to hire a hearse for conveying a corpse from York to Brecon, (for which a gross sum was

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paid, and not so much per mile,) is not chargeable with the post-horse duty. *Smith v. Moss*, 3 M. & S. 15.

(a 2) *In the case of stage coaches.*

A coach licensed under a Local Act to be used as a stage, is *not* protected by such license from the post-horse duties, if hired wholly by an individual to perform a journey. And the proprietor is liable to account to the farmer of those duties for one fourth of the hire, if let by him to carry out and bring back, notwithstanding such hiring may be to go to and return from some place within the distance and on the road to the place specified in his license; and although he receive no greater sum than his fare would have been, had he proceeded full on the usual journey as a stage. *Fuge v. Cockram*, 1 Price, 317.

(b) *Of numbering carriages.*

A carriage let to hire for less than twenty-eight days (not being let by the mile or stage) is not required to be numbered, by statute 48 Geo. III, c. 98. *Serjeant v. Smirthwaite*, Wightw. 73.

III. OF COLLECTORS UNDER.

(a) *Licenses by,—how granted.*

It seems that under a deputation from the Commissioners of stamps, authorizing A. & B. (collectors of the post-horse duties) to grant licenses for letting post horses, a license by B. for himself and A. is valid, for otherwise, if one of the collectors were to die, the power of granting licenses would be at an end. *Smith v. Moss*, 3 M. & S. 15.

IV. OF OFFENCES AGAINST.

(a) *For not delivering a list.*

(a 1) *Demand,—whether essential to.*

The offence within the st. 25 Geo. III, c. 47, in not delivering to the assessors a list of horses liable to the duty, is not complete until after demand made by the assessors. *Rex v. Benwell*, 6 T. R. 75.

V. OF THE ACTION FOR PENALTIES UNDER.

(a) *For delivering a false account.*

(a 1) *Declaration.*

1. A declaration in a penal action on the Post-horse Act, 27 Geo. III, c. 26,

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by the farmer of the tax, which states that the offence was committed, with intent to defraud the farmer (not the king) is not therefore objectionable. *Radford v. M'Intosh*, 3 T. R. 632.

2. It seems that a declaration against a postmaster on the stat. 25 Geo. III, c. 26, for delivering in a false account, not specifying in what particular it was so, is bad after verdict. *Radford v. M'Intosh*, 3 T. R. 632.

(b) *Costs in.*

In a suit by the crown, on the Post-horse Act, the court cannot give costs to the defendant, although the farmer of the duties is the real party against him. *Rex v. Corum*, 1 Anat. 504.

(c) *Compounding of.*

The costs paid to the prosecutor, on compounding a penal action on the Post-horse Act, are not to be taken as a part of his share. *North v. Smarts*, 1 B. & P. 51.

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(a) *Indictment for*, p. 777.

I. RELATIVE TO THE POSTMASTER GENERAL.

(a) *Liability of.*

Action does not lie against the postmaster general for a bank note stolen by one of the sorters, out of a letter delivered into the post office. *Whitfield v. Lord Le Despencer*, Cowp. 754.

II. RELATIVE TO THE POSTMASTER OF A TOWN.

(a) *Duties of.*

A postmaster is bound to deliver all letters to the several inhabitants within a post town or place, at their respective places of abode, at the rate of postage only, as established by act of parliament.

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Smith v. Poudich, Cowp. 182; *Rowning v. Goodchild*, 3 Wils. 443; 5 Burr. 2716; 2 Blk. 906; Lofft. 753.

III. OFFENCES RELATIVE TO.

(a) *Indictment for.*

A prisoner acquitted on a charge of felony, committed as a sorter and charger of letters, cannot be convicted on another count, charging him generally as a person employed in the post office under 7 Geo. III. *Rex v. Shaw*, 2 Blk. 789.

POUND BREACH.

(a) *When justifiable.*

(a 1) *From a previous tender.*

A tender, after impounding, is no bar to an action on stat. 2 W. & M. c. 5, for a pound breach. *Firth v. Purvis*, 5 T. R. 432.

POUND-KEEPER.

(a) *Liability of.*

(a 1) *For receiving an illegal distress.*

An action does not lie against a pound-keeper, merely for receiving a distress, though the original taking be tortious. Secus, if he exceed his duty and assent to the trespass. *Badkin v. Powell*, Cowp. 476.

POWER.

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I. OF POWERS IN GENERAL.

(a) *On the execution of*.

(a 1) *General rules*.

1. An appointment, when executed, is to be considered in the same light as if it had been inserted in the original deed, by which the power of appointment was created. *Venables v. Morris*, 7 T. R. 342, 438.

2. An appointment by deed, cannot be construed cypres. *Secus*, (c. s.) if by will. *Brudenell v. Elwes*, 1 East, 442.

3. See *Lofft*, 319.

(a 2) *In point of time*.

A power may be executed at different times, if not fully executed at the first, provided the execution in the whole does not transgress the limits of the power. *Doe*, ex dem. *Milborne v. Milborne*, 2 T. R. 721.

(a 3) *On the union of parties*.

Where powers, not merely private, are to be exercised by many; provided a sufficient number be assembled, the act of the majority binds the minority, and becomes the act of the whole body. *Grindley v. Barker*, 1 B. & P. 229.

(a 4) *On the union of separate instruments*.

In the execution of a power, in order that the deficiency of one instrument may be supplied by the sufficiency of another, it must appear that the party intended that they should operate conjointly. *Hawkins v. Kemp*, 3 East, 410.

(a 5) *In regard to the quality of the appointment*.

A power has this effect and no more; it authorizes the grantee to do something on behalf of the grantor. Under it, therefore, the grantee can do nothing but what the grantor might himself have done. Hence, too, the execution of the power only calls into action an estate, which, though hitherto dormant, was existing in the power itself. Hence, the

appointee claims under the power, not the appointment. And hence the appointment cannot be of an estate, which had it been expressly limited by the power itself, would have been void. *Robinson v. Hardcastle*, 2 T. R. 241.

(a 6) *By will*.

1. A common law power to appoint by deed, executed in the presence of two witnesses, cannot be executed by will. *Secus*, had the power been to appoint by any writing or instrument, or other general term. *Lord Darlington v. Pulteney*, Cowp. 260.

2. A mere devise of the residue will not operate as an execution of a power of appointment by will. *Buckland v. Barton*, 2 H. Bl. 136.

3. A devise of property as his own, in which the testator has no interest to bequeath, but only a power of appointment, is a good execution of the power; *secus*, if he has a devisable interest, since then the devise will operate on the interest, and on that only. *Morgan*, ex dem. *Surman v. Surman*, 1 Taunt. 289.

(a 7) *Reference to the power,—its effect*.

An express reference to the authority on executing it, may aid what would otherwise be an imperfect execution. *Rowe v. Power*, 2 N. R. 1.

(a 8) *Mode of attestation*.

1. The attestation to an instrument under a power which requires that it shall be attested, must express, that all the forms requisite to give the instrument validity, were observed; thus, if a signature, as well as a sealing and delivery, are required, an attestation that the deed was sealed and delivered, without adding signed, will not be sufficient. *Doe*, ex dem. *Mansfield*, 2 M. & S. 576; *Wright v. Wakeford*, 4 Taunt. 213.

2. If it is required by the terms of a power, authorizing a party to charge by writing; that the execution of the writing shall be attested, the attestation must express that the formalities required in the execution of the writing have been observed. Therefore, where a writing was to be signed, sealed and attested, and the attestation only expressed, "sealed and delivered in our presence," it was held, that the power was not well executed. *Wright v. Barlow*, 3 M. & S. 512.

3. A power of appointment to A. & B, "by any deed or writing under both their hands and seals, to be by them duly executed in the presence of, and to be attested by two or more credible witnesses," means executed with all the forms essential to the validity of the instrument,—signed as well as sealed in their presence. *Doc*, ex dem. *Mansfield, v. Peach*, 2 M. & S. 576. *Wright v. Wakeford*, 4 Taunt. 213.

4. Where lands are limited to such uses as A, by any deed or writing under his hand and seal, attested by two or more credible witnesses, shall direct; a will, with a memorandum of attestation, that it was signed (only) in the presence of the subscribing witnesses, is not a good execution of the power. And the defect is not cured by calling one of the subscribing witnesses to prove that, in fact, the will was sealed, as well as signed, in their presence. *Doc*, ex dem. *Hotchkiss, v. Pearce*, 2 Mars. 102; 6 Taunt. 402.

5. An instrument under a power, is executed by two, with all formalities essential to give it validity in the presence of witnesses; the attestation, however, is defective. After the death of one of the parties, the witnesses subjoin a fresh and complete attestation. Held, that since it was done after the decease of one party it was unavailing, for it was giving to his act a force and operation after his death, which did not belong to it in his life-time. *Doc*, ex dem. *Mansfield, v. Peach*, 2 M. & S. 576; *Wright v. Wakeford*, 4 Taunt. 213.

(a 9) By attorney.

1. A power cannot be delegated. Where, however, authority is given by A. to B, to execute a power himself, or give it to another, by giving it to the other he does not delegate it. *Doc*, ex dem. *Duke of Devonshire, v. Lord George Cavendish*, 4 T. R. 744, n.

2. *Semble*, under a power of attorney, by A. to B, to underwrite any policy of insurance not exceeding 100 l. and to subscribe the same in his (A.'s) name, and to settle and adjust losses, &c." Although B. cannot delegate his whole authority to another, yet, having signed a slip for a policy of insurance, the signature of his clerk for him, and in his absence, to a policy made in pursuance thereof, is a good execution of the power, that being

only a ministerial act, which he might authorize another to do for him; but he must himself execute the power, in all matters in which his judgment and discretion are requisite. *Mason v. Joseph*, 1 Smith, 406.

(a 10) Illusory.

No appointment is held illusory in a court of law. *Morgan*, ex dem. *Surman, v. Surman*, 1 Taunt. 289.

(a 11) Void in whole or in part.

In the case of realty, the execution of a power may be good as to part, and void as to the residue. *Doc*, ex dem. *Duke of Devonshire, v. Lord George Cavendish*, 4 T. R. 743, n.

(a 12) Confirmation of.

An appointment, not valid in its original, cannot be made so by subsequent circumstances. *Brudenell v. Elwes*, 1 East, 442.

(a 13) Revocation of.

The rule that an authority, once executed, is at an end, only applies where the execution was valid. *Strachey v. Turley*, 11 East, 194.

(b) Construction of.

1. Powers are to be construed in the same manner in a court of law as in equity. Dougl. 293.

2. In the construction of powers, the intention is the governing principle. *Pomery v. Partington*, 3 T. R. 685; *Doc*, ex dem. *Duke of Devonshire, v. Lord George Cavendish*, 4 T. R. 743, n.

3. In the execution of powers, the material object to be attended to is the intention of the person creating the power; and that intention is to be collected from the words of the will, or other instrument, giving the power, according to the ordinary and common acceptance of the words, and not according to any legal or technical exposition of them. *Griffith v. Harrison*, 4 T. R. 748, 749.

4. Powers are to be carried into effect according to the intention of those who created them; and in ascertaining what that intention was, the circumstances of the case (nothing opposing) may be used as an assisting medium. Thus, where A. seised in fee of W, X, and Y, closes; whereof X. and Y. had been antiently

and, usually, demised, but W. had not; devised to trustees limited to certain executory uses, with power to the trustees, during the minorities of those to whom the premises might descend under the limitations, and to any tenant for life, to grant any lease of all or any part of the lands, so as upon such lease there be reserved the antient and accustomed rent usually paid for the same;—it was held, that the power only extended to X. and Y. closes, since that it never could have been the devisor's intention that the trustees who might have an interest for a day only, and who were not intended to have any beneficial interest for themselves, should be able to alter the nature of the property, and prevent the *cestuy que* use from occupying what the devisor had always reserved for his own occupation. *Doe*, ex dem. *Bartlett*, v. *Rendle*, 3 M. & S. 99.

5. Where two intentions are expressed, a general and a particular one, and the particular intent cannot take effect, the words shall be so construed as to give effect to the general intent. Hence, where an estate was limited to A, on his marriage, for life, with power to appoint amongst the children of the marriage for such estates as he chose, who by his will appointed to his son B, for life, remainder to the first and other sons of B, and in default of such issue then to his son C, it was held that B. took an estate tail, the general intent being that his issue should inherit, and the particular limitation expressed being void. *Robinson* v. *Hardcastle*, 2 T. R. 241, 380, 781.

6. The execution of a power in the form prescribed, is a condition precedent, by the observance of which alone, the right by virtue of the power can arise. If, therefore, a power to lease under the usual covenants be given, and a lease be made, in which there is an unusual covenant, the lease is void in toto, and cannot be avoided as to that covenant only. *Doe*, ex dem. *Ellis*, v. *Sandham*, 1 T. R. 705.

7. Where a qualification annexed to a power, goes in destruction of the power, the law will dispense with the qualification. Dougl. 574.

II. OF LEASING POWERS.

(a) Implied.

A power of the jointress to make leases

not being expressed, cannot be implied under a private act of parliament. *Roe*, d. *Duke of Bolton*, v. *Grantham*, 3 Burr. 1259.

(b) Assignment of.

A leasing power is given to A, tenant for life, and after his decease to B. A. grants to B. his life estate (without noticing the power); B. cannot lease under the power during A.'s life-time. *Case* v. *Day*, 13 East, 118.

(c) Execution of.

(c 1) General rule.

1. Powers must be strictly pursued; a lease, therefore, by tenant for life, with power to lease in possession and not in reversion, reserving three-fourths of the best yearly rent that could be obtained, is void against the remainder-man, if either essential is wanting. *Doe*, ex dem. *Pulteney*, v. *Lady Caran*, 5 T. R. 567.

2. See Lofft. 319.

(c 2) Whether the lease is considered as in possession or in reversion.

1. Though the *habendum* in a lease by deed is prospective from the date, yet is the lease in possession, if not executed until or after the day in the *habendum*. *Doe*, ex dem. *Cox*, v. *Day*, 10 East, 427.

2. Where tenant for life has a power to grant leases "in possession, but not by way of reversion or future interest," a lease *per verba de presenti* is not contrary to the power, though the estate, at the time of making the lease, was held by tenants at will, or from year to year, if at the time they received directions from the grantor of the lease to pay their rent to the lessee. *Goodtitle*, d. *Clarges*, v. *Funucan*, Dougl. 565.

3. One under a power reserved in his marriage settlement, to lease for twenty-one years, in possession but not in reversion, grants a lease to his only daughter for twenty-one years, to commence from the day of the date;—the lease is good. *Pugh* v. *Duke of Leeds*, Cowp. 714.

(c 3) Reservation of the best rent, what is or is not.

1. The least of two offers may be the best rent that can be obtained within the meaning of a leasing power, since regard may be paid to the qualifications of the tenant. *Doe*, ex dem. *Lawton*, v. *Radcliffe*, 10 East, 278.

2. A power to lease stipulates that the best rent shall be reserved, without taking any sum of money or other thing for or in lieu of a fine or income for the same. Under this power a lease is granted in October, to be computed from March preceding, rent payable half-yearly in March and November, first payment to be made in November next. Held, that this was not taking a fine, since it was apparent that there had been an actual occupation since March. But, *semble*, the fact, that there had not, might have been averred. *Isherwood v. Oldknow*, 3 M. & S. 382.

(c 4) *Void in whole or in part.*

1. A lease under a power at an entire rent, if void as to parcel of the land, is void as to the whole. *Doe, ex dem. Allan, v. Culbert*, 2 East, 376.

2. If X. and Y. closes are devised for life, with remainders over, with power to the tenant for life to lease X. only reserving the antient and accustomed rent usually paid on leasing it, a demise of both, reserving the antient rent payable for X, is void against the remainder-man altogether, and not as to Y. close only; the rent reserved issues out of both closes, so that the antient rent was not reserved on demising X. If, however, there be separate reservations, viz. the antient rent for X, and an additional rent for Y, the lease is only void as to Y, since a lease may (nothing opposing) be good as to part, and void as to the residue. *Doe, ex dem. Bartlett, v. Rendle*, 3 M. & S. 99.

3. A lease for a term exceeding what the power warrants, is void in toto. *Roe, ex dem. Brune, v. Prideaux*, 10 East, 158.

4. *Vide supra*, (b), pl. 6.

(c 5) *Confirmation of, by the remainder-man.*

A lease by tenant for life, under a power not pursuant to the power, is void against the remainder-man, and incapable of confirmation by him. If, however, he accepts rent, *eo nomine*, for a period subsequent to the death of tenant for life, though under an ignorance of his real rights, a yearly tenancy is thereby created. *Doe, ex dem. Martin, v. Watts*, 7 T. R. 83.

(c 6) *Miscellaneous.*

1. Though a tenant for life, with power to grant leases in possession for twenty-one years, convey his life estate to pay an annuity for his life, and the surplus to

himself, the power is not thereby extinguished; he may still grant leases agreeable to the terms of the power. *Renn v. Bulkeley*, Dougl. 292.

2. A. having a life estate with a power to grant building leases for ninety-nine years, so as the best rent be reserved that can be got for the same, &c. demises (reciting the power, and by virtue thereof, and of all other powers in her vested) to B, in consideration of rent, and of the surrender of a former demise by the previous tenant in fee, &c. and at the time the original lease and counterpart are mutually cancelled and exchanged; and on a special verdict finding the second lease to be void, the best rent not being reserved; held, that although A. had a life estate, and might have made a good demise for her life, yet the lease referring to the power, it was the intention of the parties it should operate by virtue of the power, and not out of the estate, and as the second lease was void under the power, and did not operate according to the intention of the parties, it was no surrender of the first. *Roe, d. Earl of Berkeley, v. Archbishop of York*, 2 Smith, 166; 6 East, 86.

(d) *Construction of.*

(d 1) *General rule.*

A power to lease for years is to be construed liberally. *Right, d. Bassett, v. Thomas*, 3 Burr. 1441; 1 Blk. 446.

(d 2) *In regard to quantity.*

1. Under a power—to lease all *manors*, messuages, lands, &c. so as there be reserved as much *rent* as is now paid for the same; such parts of the estates enumerated in the power as have never been demised may be let. *Goodtitle, d. Clarges, v. Funckun*, Dougl. 565.

2. A power to lease all or any of the said hereditaments, &c. so as the usual rents, &c. be reserved, is confined to such parts of the premises as had been demised before. *Pomery v. Partington*, 3 T. R. 665.

3. A power to lease for one, two, or three lives, such lands as were then demised for any such term, applies to such lands only as the lives on which they are held are certain and co-existing. *Doe, ex dem. Wyndham, v. Halcombe*, 7 T. R. 713.

4. *Vide supra*, (b), pl. 4.

(d 3) *In regard to duration.*

1. A power to lease for any term not exceeding twenty-one years or three lives, so as no greater estate than for three lives be in being, does not warrant a lease for ninety-nine years determinable upon three lives. *Roe*, ex dem. *Brune*, v. *Prideaux*, 10 East, 158.

2. A power to lease for a certain period, warrants a lease for a shorter time. Thus, under a power to lease for twenty-one years, the lease may be for fourteen. The power of leasing is given for the benefit of the lessor; now every one may renounce a benefit in all or in part. *Isherwood* v. *Oldknow*, 3 M. & S. 382.

(d 4) *In regard to implied stipulations.*

A custom of the country, directly contrary to a leasing power, cannot be engrafted upon it. *Doe*, ex dem. *Allen*, v. *Calvert*, 2 East, 376.

(d 5) *In regard to the term "usual rent."*

Where a power of leasing at the usual rent is granted, the term "usual," means the rent at which the property had been before letten, not the rent at which property of that description usually lets in the neighbourhood. Hence, where A. devised a reversion, expectant on the death of B, with power to the devisee to grant leases, so as there shall be reserved thereon the "usual or other the most rent" that can be had for the same; and the devisee let the premises at a rent exceeding that at which the party in possession had leased them at the time of A's death, but inferior to their real value (having taken a fine upon the lease);—it was held, that the power of leasing was well executed. *Doe*, ex dem. *Newnham*, v. *Creed*, 4 M. & S. 371.

(d 6) *Miscellaneous.*

1. A case, in which the question was, as to a deviser's intention in granting a power of renewal by adding a life in an estate. *Doe*, ex dem. *Hardwicke*, v. *Hardwicke*, 10 East, 549.

2. A power of leasing, which stipulates against giving leave to the tenant to commit waste, does not prohibit the landlord covenanting to repair. *Doe*, ex dem. *Bromley*, v. *Bettison*, 11 East, 305.

(e) *On the rights of the successive reversioners in the limitation.*(e 1) *To sue on the covenants annexed.*

A lease granted under a power, is not considered as created by the party demising, but as arising out of the power itself, and therefore made by the original grantor; the lessor is accounted his bailiff, and as executing an authority on his behalf. Supposing, therefore, that at common law covenants did not run with the reversion, and that one suing thereon as assignee must make his stand by the statute 32 Hen. VIII, c. 34, and so bring himself within the description in the statute of "grantee or assignee of the lessor;" the next in the limitation to the lessor, is, by the foregoing doctrine, enabled so to do. He claims, not under the party demising, but under the original grantor, who in legal effect was the lessor of the land, and under whom, as assignee, therefore, he may sue. *Isherwood* v. *Oldknow*, 3 M. & S. 382.

III. OF STATUTABLE POWERS.

(a) *Execution of.*

Where, by statute, a special authority is delegated to particular persons, affecting the property of individuals, it must be strictly pursued, and appear to have been so on the face of their proceedings. *Rex* v. *Croke*, Cowp. 26.

IV. POWERS IN MISCELLANEOUS CASES.

(a) *Valid or void.*

A power annexed to a devise in fee to a married woman, that she may dispose of the estate without the controul of her husband, is void. *Goodhill* v. *Brigham*, 1 B. & P. 192.

(b) *Execution of.*(b 1) *At different times.*

A power to make a life estate to the wife, may be executed at different times. *Zouch*, d. *Woolston*, v. *Woolston*, 2 Burr. 1136; 1 Blk. 281.

(b 2) *In the case of a feme covert.*

A power given to a feme covert, to be executed by will, is well executed by her writing, purporting to be a will. *Drirer*, ex dem. *Berry*, v. *Thompson*, 4 Taunt. 294.

(b 3) *By will.*

A devise of an estate to A. during her life, and at her disposal afterwards, to leave it to whom she pleases;—the appointment can be only by will. *Doe, ex dem. Thorley, v. Thorley*, 10 East, 438.

(b 4) *Mode of attestation.*

1. Under a power to appoint copyhold premises, by deed or will, signed in the presence of three witnesses; the will only need be so signed. *Doe, ex dem. Harman, v. Morgan*, 7 T. R. 103.

2. Power to appoint by will, signed and published in presence of and attested by two witnesses: will "signed by me S. M.; witness A. & B," whom the testatrix informed that the paper was her will. —Held an insufficient execution. *Moodie v. Reid*, 7 Taunt. 355.

(b 5) *Enrolment of.*

Where in a marriage settlement by tenant in tail, a power is reserved to him of revoking the old and declaring new uses, by writing, attested by three witnesses, and to be enrolled, with consent of certain trustees; the enrolment must be in his life time. *Hawkins v. Kemp*, 3 East, 410.

(b 6) *How it enures.*

Where A. was seised in fee, and conveyed to B. and his heirs, to the use of such persons and for such estates as he (A.) should appoint, by deed or will, remainder to the use of A. and his heirs, and afterwards granted a rent-charge, with a covenant for him and his assigns to pay the same, and then A. & B. by lease and release, &c. release, and also appoint to C. the premises, subject to the rent-charge, and C. enters into a covenant with A. to pay the same rent-charge; held, that C. is not liable personally to an action of covenant at the suit of the grantee of the rent-charge as assignee, the conveyance operating under the power and not out of the estate of A. *Roach v. Wadhams*, 2 Smith, 376; 6 East, 289.

(b 7) *Revocation of.*

1. A power to appoint a sum of money by deed or will, is ambulatory during the life of the party appointing. *Perrott v. Perrott*, 14 East, 423.

2. A power of appointment is given by

a marriage settlement, unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should, from time to time, either with or without power of revocation, direct. The survivor may revoke an appointment made by both, with power of revocation to them and the survivor, and appoint anew. *Brudenell v. Elwes*, 1 East, 442.

(c) *Construction of.*(c 1) *Powers to appoint amongst children.*

1. A power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children. *Goodtitle, d. Russel, v. Weal*, 2 Wils. 369.

2. If there be a power under a marriage settlement, to give to the children of the marriage, in such shares, &c., and for such estate, &c., and there is but one child of the marriage, such child must have the whole estate which was settled. *Roe, d. Buxton, v. Demt*, 2 Wils. 336.

3. A power to appoint to children extends to grandchildren, where the children were in being when the power was created. *The Duke of Devonshire v. Cavendish*, 2 T. R. 244. *Secus*, where they are not in being. *Robinson v. Hardcastle*, 2 T. R. 241.

4. A power given to appoint to children may extend to grand-children, if an intention to that effect can be made out. *Doe, ex dem. Duke of Devonshire, v. Lord George Cavendish*, 4 T. R. 741, n.

5. Under a devise to testator's wife, remainder to his children, subject to her appointment; a child born in the testator's life-time, but after making the will, is an object of the appointment. *Morgan, ex dem. Surman, v. Surman*, 1 Taunt. 289.

6. A. having a power to limit an estate to the use of such child or children of the said A. and for such estate or estates as she should direct, &c. and having two daughters, as to one moiety of the said estate, appoints it to the use of her eldest daughter B. for life, with remainder to the first and other sons of her said daughter in tail male, remainder to the daughters of the said B. in tail general, remainder to her youngest daughter C. for life, with remainder to her first and other sons, &c. remainder to the daughters of the said C. in like manner, remainder to the right

heirs of the eldest daughter B. and so *vice versa* as to the other moiety.—Held, that such appointment is an excess of A.'s power, as far as respects the limitation to her grand-children, but good as to the limitation to her daughters for life. *Adams v. Adams*, Cowp. 651.

(c 2) *Powers to appoint amongst several.*

1. In a marriage settlement there is a power of appointing a real estate to *such child and children* of the marriage, for such estate and estates as the husband should direct. And for want of such appointment the estate was settled upon all and every the child and children of the marriage equally. Held, that the appointment might be to one child in exclusion of the rest. "Such child" is an expression applicable to one of several children. *Swift, ex dem. Huntley, v. Gregson*, 1 T. R. 432.

2. An exclusive appointment under a power of appointing "to and amongst such of his relations," &c. is good. *Spring, ex dem. Titcher, v. Biles*, 1 T. R. 435, n. (f).

(c 3) *Other cases.*

1. An estate being conveyed by a marriage settlement to trustees, to the use of the letter (the husband) for life, with remainders over, and with a power to the settler, with the consent of the trustees, to revoke all the uses in the settlement, and the settler having granted an estate for his own life, for valuable consideration in the settled estate, a revocation, subsequent thereto, of all the uses executed by him with consent of the trustees, and a conveyance of the estate to a purchaser for valuable consideration also, but with notice of the prior grant, for the settler's life, shall not affect the interest granted for his life. *Goodright, d. Haré, v. Cator*, Dougl. 477.

2. A power given to an executrix by that name to charge the testator's estate, only applies to that portion of it which comes to her as executrix, namely, the personal estate, even though she be trustee of the real. *Doe, ex dem. Milborne, v. Milborne*, 2 T. R. 791.

3. An estate is limited to uses, and a power given to revoke those uses, by selling and conveying the estate to a purchaser, so as that the purchase money should be paid into the hands of A, and

not of B, to be laid out in lands, to be settled to like uses. Held, that the power of revocation was conditional only,—upon payment of the purchase money in the manner directed. *Doe, ex dem. Willis, v. Martin*, 4 T. R. 39.

4. A. devised lands to his wife B. for life, with a power of appointment to such his child or children (of whom there were three then alive), in such manner, share and proportion as she should direct, "but so as the said lands which were to be considered as one estate, should not be divided, but transmitted whole and entire to his heirs and family," and in default of appointment, remainder to his own right heirs. *Query*, whether B. has the power of appointing beyond a life estate, since otherwise the estate could not be transmitted whole and entire, &c. But, supposing she has, then, per lord Kenyon, C. J. and Grose, J, the power must be exhausted on the children, and therefore, that a limitation to grand-children in tail, after an estate for life to a child, was void; however, that B.'s general intention being, that the grand-children should inherit, the child took an estate tail.—Per Ashurst, J. and Buller, J, the word children is co-extensive with issue, so that the limitation to the grand-children was good, and the child took for life only. *Griffith v. Harrison*, 4 T. R. 737.

5. Where real and personal property are bequeathed to A, subject to a power of appointing the same unto B. and C, in such proportions as he should think proper, the power is well executed, though the personalty (or a portion of it) is appointed to one, and the realty to the other. *Morgan, ex dem. Surman, v. Surman*, 1 Taunt. 289.

6. A. devises a copyhold estate to trustees, to the use of B. for her life; then to such uses as B, by her last will, should appoint; and in default of such appointment, to the right heirs of B. A. dies; the trustees are admitted in fee on the trusts declared by the will. B. by an appointment, in form of a deed poll, in nature of a will, irrevocably devises all her interest in the premises to C, and declares that no subsequent will should revoke this disposition; the premises are surrendered to the use of C, in reversion, and he is admitted accordingly. B. by another will, afterwards devises the pre-

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mises to D, and his heirs, so as not to be subject to any of her debts, contracts or engagements: under this will D. was admitted, and soon afterwards B. died. Held, that by the devise to D, the former appointment in favour of C. was revoked, and the legal estate divested out of the trustees under A.'s will, and vested in D; and that a surrender to D, by the trustees was as effectual as if it had been made by B. *Doe, d. Woodcock, v. Barthrop*, 1 Mars. 90; 5 Taunt. 382.

7. A. devises, after certain legacies, "all the residue of what he dies possessed of, or in expectancy, to his wife B. for her life, reserving to her full power to will away any part or proportion of his said residue at her decease; and after that period, to his daughter." A. dies, and B. devises away the whole of her property. Held, that this was a good execution of the power. *Cooke v. Farrand*, 2 Mars. 421; 7 Taunt. 122.

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I. GENERAL MAXIMS RELATIVE TO.

- (a) *Its nature defined.*

The practice of the court is the law of the court. *Wilson v. Rastall*, 4 T. R. 753.

- (b) *Of its conformity with statutes.*

The court will not supersede an act of parliament by any regulations of their own, touching their practice. *Rogers v. Reeves*, 1 T. R. 492.

- (c) *Of its conclusiveness.*

1. Where a practice has existed, it is convenient to adhere to it, because it is the practice, even though no reason can be assigned for it. And more especially ought the practice to be adhered to if by possibility any advantage may result from it. *Bovill v. Wood*, 2 M. & S. 25.

2. Officers in the courts of justice are bound by practice, though not immemorial. *Deverell's case*, 2 Anst. 624.

II. IN RELATION TO AN ACTION.

(a) *Of the notice of action.*(a 1) *Mode of computing the time of.*

Where time is to be computed from an act done, the day on which it is done is to be included; thus the day on which a notice of action is served under a statute requiring it. *Castle v. Burditt*, 3 T. R. 623.

(a 2) *Description of the place of abode.*

A notice stating the cause of action to be for a trespass in the plaintiff's dwelling house at C, is not a sufficient description of his present place of abode to satisfy a statute requiring notice thereof. *Williams v. Burgess*, 3 Taunt. 127.

(a 3) *Application of, to a different purpose to that expressed therein.*

A notice of action expressed to be given pursuant to a particular statute, is not available as a notice under another statute, where it appears that the defendant might have been misled by the terms. *Hider v. Dorrell*, 1 Taunt. 383.

(a 4) *Whether joint or several, in an action against several.*

A separate notice to each of several persons intended to be sued in trespass, is sufficient to found a joint action against all of them, for acts committed in pursuance of an act of parliament, which provides, that no plaintiff shall recover in an action for any thing done in pursuance thereof, without notice to the defendant or defendants, of such intended action, although none of the other persons, who are afterwards joined in the action, are named in the notice to either of them. In such an action a deviation from the line described by the act of parliament as the course of an intended canal, does not deprive the defendants of their rights to notice, before action brought, on the ground that what was done by them was not done in pursuance of the act. *Agar v. Morgan*, 1 Price, 126.

(b) *Relative to the commencement of an action.*(b 1) *What considered as, in K. B.*

In B. R. the bill is the commencement of the suit, and the *latitat* is considered as process only, except where it is replied to. the Statute of Limitations,—or to a ten-

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der,—or where it is given in evidence to support a penal action. *Foster v. Bonner*, Cowp. 454.

(c) *Relative to double actions in different courts.*(c 1) *On the exercise of an indirect jurisdiction over the action in the other court.*

Where there are actions in K. B. and also in another court, between the same parties, K. B. will not impose terms concerning the actions in K. B. in order to compel any thing to be done in the other actions. *Benton v. Praed*, 1 Smith, 423.

(d) *Relative to the consolidation of actions.*(d 1) *When actions will be consolidated.*

Two actions commenced at the same time, in the same place, and for causes which may be joined, will be consolidated, unless the plaintiff can shew cause to the contrary. *Cecil v. Brigges*; *Same v. Same*, 2 T. R. 639.

(d 2) *When actions will not be consolidated.*

1. Separate actions against the husband and wife, and against the husband alone, cannot be consolidated. *Swithin v. Vincent*, 2 Wils. 227.

2. The court will not compel a party to consolidate actions brought on two promissory notes, though both notes became due, and both actions were commenced, in the long vacation, and the writs returnable on the same day. *Le Jeune v. Sheridan*, Forrest. 30.

3. In three penal actions for bribery by the same plaintiff against the same defendant, the court refused to consolidate them, there being forty instances of bribery declared upon in each action. *Benton v. Praed*, 1 Smith, 423.

(d 3) *The term "event," ascertained.*

Where several causes are consolidated to abide the event of one, such event is to be understood as will do justice between the parties. *Anon. Loftt.* 147; *Coote v. Thackeray*, Id. 151.

(d 4) *Implied reservation of liberty in the court to try the other causes.*

It is an implied condition of a consolidation rule, that a second, third, &c. cause, may be tried in like manner, and with like evidence as the first, if the court see fit. *Cohen v. Bulkeley*, 5 Taunt. 165.

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(d 5) *Individuality of the actions consolidated, in regard to subsequent events.*

Where the terms of a consolidation rule are merely that the causes shall be bound by the verdict in one, circumstances subsequent to the verdict which affect that one have no influence on the others. *Aylwin v. Favine*, 2 N. R. 430.

(d 6) *Privileges of the defendants in the other causes.*

Where upon the trial of one of several causes which were consolidated, there was a rule nisi obtained for a new trial on a point of law reserved, and the defendant agreed to abandon it, the defendants in other causes were permitted upon motion to have the name of another defendant inserted in his place, in order to have the benefit of the rule to shew cause. *Lubbock v. Claggett*, 3 Smith, 397.

III. RELATIVE TO THE DECLARATION.

(a) *Of the time allowed for.*(a 1) *In relation to bail.*

The plaintiff is not bound to declare before the defendant is completely in court, which, in a bailable action, is not until the bail have justified. *Rolleston v. Scott*, 5 T. R. 372.

(a 2) *In K. B.*

In the K. B. a plaintiff must declare within twelve months after the return of the writ; if he do not deliver his declaration within two terms, a nonpros may be signed; but if it be not signed, the plaintiff has the year to declare in. *Worley v. Lee*, 2 T. R. 112; *Penny v. Harvey*, 3 T. R. 123.

(a 3) *In C. B.*

In C. B. whether the defendant is in custody or not, and though the plaintiff may not be in a situation to declare, as where he is proceeding to outlawry against one of two defendants, the cause is out of court, if he does not declare before the end of the second term, or obtain further time. *Sykes v. Bauwens*, 2 N. R. 404.

(b) *Whether to be delivered or filed.*

Where the defendant's place of residence is known, the declaration must be delivered, not filed. *Oldham v. Burrell*, 7 T. R. 26.

(c) *Of the delivery of.*(c 1) *In suits against several.*

1. A declaration cannot be delivered against one of two defendants, until both appear. *Knight v. Parker*, 2 Blk. 759.

2. In an action of debt on simple contract against A. and B, the service of notice of declaration on A, before an appearance is entered for B, is a nullity, and A. need not notice the irregularity till judgment is signed against him. *Balentine v. Ralph*, Forrest. 31.

(c 2) *Whose act considered as.*

The delivery of the declaration is the act, not of the court, but of the party. *Pugh v. Robinson*, 1 T. R. 116.

(d) *Of the filing of.*(d 1) *Whether too early.*

The court will not (in relation to the process) inquire into the exact time of the day at which the declaration was filed. Therefore it may be filed at an hour previous to that at which the process is served. *Robertson v. Douglas*, 1 T. R. 191.

(e) *Of the service of.*

1. Though the defendant (served with process) cannot be found, and though his abode is unknown, yet affixing declaration in office will not be good service, unless by leave of the court. *Dirris v. Mackenzie*, 5 Taunt. 777.

2. Where a defendant keeps out of the way to avoid service of process, and a notice of declaration is sent to him in a letter by the post, which is returned opened, and marked "refused;" this is sufficient service. *Aldred v. Hicks*, 1 Mars. 8; 5 Taunt. 186.

(f) *Of the notice of.*(f 1) *When requisite.*

In C. B. notice of declaration is only required in actions not bailable. *Holm v. Bargus*, 2 B. & P. 42.

(f 2) *When not requisite.*

Personal notice of a declaration being filed, is not necessary where bail is put in. *Simmons v. Shannon*, 3 Wils. 147; 2 Blk. 725.

(f 3) *When given.*

Notice of declaration filed in chief, cannot be given until after the return day of the process. *Pope v. Turner*, 4 Taunt. 818; *secus*, notice of declaration filed con-

ditionally. *Brook v. Bennett*, 3 Smith, 431; *Haynes v. Jones*, 3 Taunt. 404. And though in K. B. the notice must be given after the writ has been served. *Steward v. Lund*, 12 East, 116; yet in C. B. the notice and writ may be served together. *Haynes v. Jones*, 3 Taunt. 404.

(f 4) *Where given.*

1. If after due search the defendant cannot be found, the notice of declaration should be served at his last place of abode, if known. *Holston v. Culliford*, 1 B. & P. 214.

2. A communication to the defendant and his attorney, that a declaration was stuck up in the office, is sufficient, without service at the last place of abode. *Love-more v. Coker*, 1 N. R. 279.

(f 5) *Form of.*

Notice of declaration need not state the damages laid. *Hetherington v. Hobson*, 6 Taunt. 331.

(f 6) *Waiver of irregularity in.*

An irregularity in the notice of declaration, is waived by taking out a summons to stay proceedings on the bail bond. *Davis v. Owen*, 1 B. & P. 342.

(g) *De bene esse.*

(g 1) *Time allowed for.*

The plaintiff may declare conditionally, before the time for the defendant's appearance has expired, but not afterwards. *Smith v. Painter*, 2 T. R. 719; *Baker v. Choper*, 6 T. R. 548; whether the action be bailable or not, *Kenman v. Bean*, 2 N. R. 433.

(g 2) *In actions against several.*

In a joint action against several, after the appearance of one served with separate process, a declaration cannot be delivered conditionally against all. *Turner v. Portall*, 2 N. R. 231.

(g 3) *Notice of—its form.*

Notice of declaration generally, is good notice of a declaration filed *de bene esse*. *Cort v. Jacques*, 8 T. R. 77.

(h) *In chief.*

(h 1) *Whether too early.*

The plaintiff cannot declare in chief until the defendant has appeared, or com-

mon bail has been filed for him by the plaintiff. *Smith v. Painter*, 2 T. R. 719.

(i) *By the bye.*

(i 1) *By the original plaintiff.*

The original plaintiff cannot, in any case, declare by the bye, before he has declared in chief. *Delves v. Strange*, 6 T. R. 158; *Tetherington v. Golding*, 7 T. R. 80.

(i 2) *Time allowed for.*

1. Where proceedings are by bill, and the defendant be in court, any other plaintiff may deliver a declaration against him by the bye, within the term in which the writ is returnable. *Sulgard v. Harris*, 4 Burr. 2180.

2. The defendant is considered as in court during the whole of the term in which he has pleaded; therefore a declaration by the bye, delivered during that term, though after judgment of *billa cassetur et eat sine die* on the plea (here in abatement), is regular. *Milles v. Andrews*, 5 T. R. 634.

(i 3) *Irregularity in, how waived.*

If the original plaintiff declare by the bye, before he has declared in chief, it is only an irregularity; which, therefore, may be waived; as, by taking the declaration out of the office. *Archer v. Barnes*, 3 East, 341.

(k) *Of the rule to declare.*

(k 1) *After time allowed.*

No rule to declare is necessary after further time has been obtained. *Jones v. Powell*, 1 H. B. 87.

(l) *Rights of adversary on amending the declaration.*

1. On amending a declaration, defendant is entitled to a new four days rule to plead. *Blunt v. Morris*, 2 Wils. 785.

2. In K. B. if the plaintiff amend his declaration the same term, the defendant has two days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*; (Str. 705.) but if the amendment be made in a subsequent term, he is entitled to a new four day rule to plead. *Barton v. Moore*, 8 T. R. 87. As to the rule in C. B. see 2 Bl. Rep. 785.

3. An amendment of the plaintiff's declaration, does not necessarily entitle the defendant to plead *de novo*, but only where the amendment alters the state of the defendant's case. *Woodroffe v. Watson*, 6 Taunt. 400.

IV. RELATIVE TO APPEARANCE.

(a) *Voluntary.*

The rule of Trin. 4 W. & M. that a voluntary appearance shall be ineffectual, unless process be sued out within fourteen days afterwards, cannot be insisted on by a stranger to that action, unless on the ground of fraud. *Mackreth v. Jackson*, 1 M. & S. 408, n.

(b) *Entry of, by plaintiff.*

(b 1) *As of a preceding term.*

At any time before the first day of full term next after that in which the process was returnable, an appearance may be entered as of such preceding term, so as to warrant a nonpros. *Prigmore v. Bradley*, 6 East, 314.

(c) *Entry of, how waived.*

(c 1) *By accepting the declaration.*

By accepting the declaration, the want of having entered an appearance is waived. *Williams v. Strahan*, 1 N. R. 309.

(c 2) *By pleading.*

Is a waiver. *Anon.* Loft. 237.

V. RELATIVE TO OYER.

(a) *Of the time allowed for.*

Two days, both exclusive, are allowed to give oyer in. *Page v. Divine*, 2 T. R. 40.

(b) *Of Proceedings thereon.*

The party of whom oyer is demanded must carry the copy of the instrument to the opposite party. *Page v. Divine*, 2 T. R. 40.

VI. RELATIVE TO IMPARLANCE.

(a) *When not entitled to.*

1. Upon process returnable the first, second, or third return of any term, if the plaintiff declare within four days before the end of the term, the defendant shall plead without an imparlance. C. B. Trin. 8 Geo. III. 3 Wils. 381.

2. The defendant is not entitled to an imparlance, where the plaintiff is pre-

vented from declaring before the essoign day, by an essoign cast. *Rooke v. The Earl of Leicester*, 2 T. R. 16.

3. A writ was returnable the last day of one term, and bail were justified on the fourth day of the next, before the essoign day, of which no declaration *de bene esse* was delivered. Held, that as the plaintiff had not been guilty of laches, by not declaring *de bene esse*, the defendant was not entitled to an imparlance. *Rolleston v. Scott*, 5 T. R. 372.

4. Though the plaintiff does not declare until the term following that in which the cause has been duly removed from an inferior court by the defendant; the defendant is not entitled to an imparlance. *Smith v. James*, 6 T. R. 752.

5. Since a plaintiff is not bound to declare *de bene esse*, his omitting so to declare before the essoign of a term, will not entitle the defendant to an imparlance. *Bailey v. Hantler*, 2 B. & P. 126.

6. Where a writ is returnable the last return of one term, and the defendant does not justify bail till the first day of the next term, he is not entitled to an imparlance, though the plaintiff do not deliver a declaration *de bene esse*, till after the essoign day of the second term. *Kent v. Yates*, 1 Mars. 587; 6 Taunt. 261.

(b) *When granted by favour.*

On declaration in covenant, running to great length, Exchequer will grant an imparlance, although the declaration has been filed in time to entitle the plaintiff to a plea. *Smith v. Bulkeley*, 2 Price, 114.

(c) *Special,—how obtained.*

A special imparlance, saving and reserving all advantages and exceptions whatsoever, can only be had by leave of the court, upon motion within the four days. *Grant v. Lord Londes*, 2 Blk. 1094.

VII. RELATIVE TO THE PLEA.

(a) *Of the time allowed for.*

(a 1) *In relation to defendant's residence.*

With reference to the time allowed for pleading, the place where the defendant is arrested is the place of his residence. *Kutiff v. Gascoyne*, 4 T. R. 553, n. (a).

(a 2) *Where declaration is filed on the essoign day.*

The rule that defendant must plead in eight days from declaration filed, applies where it is filed on the essoign day. *Hutchinson v. Best*, 1 Taunt. 22.

(a 3) *Mode of computing.*

1. The time of plea pleaded is to be reckoned from the date of the entry of the plea on the record, not from the time of its being delivered to the plaintiff. *Sullivan v. Montagu*, Dougl. 109.

2. If a declaration be delivered *de bene esse*, on or before the appearance day, the defendant shall have four days to plead in from the appearance day; if delivered after the day of appearance, then four days from the delivery. 2 Blk. 1243.

(a 4) *In country causes.*

In a country cause, though the defendant reside within twenty miles of London, he is entitled to eight days notice to plead, whether he has himself appeared, or an appearance has been entered for him. *Holland v. Cooke*, 1 M. & S. 566.

(a 5) *After demand of a plea.*

A defendant has twenty-four hours clear to plead after demand of a plea. *Bowles v. Edwards*, 4 T. R. 118; exclusive of an intervening Sunday. *Solomons v. Freeman*, 4 T. R. 557.

(a 6) *When under conditions.*

The condition of pleading issuably, and taking short notice of trial for the next sittings, obliges the defendant so to plead that, as far as depends upon him, the cause may come to trial at those sittings; therefore, if the declaration is delivered after the sittings have begun, he must plead *instantly*, provided, that by so doing, the plaintiff is in time to give notice of trial for the adjournment day. *Price v. Simpson*, 1 Taunt. 343.

(a 7) *After a particular of the demand.*

The same time is allowed for pleading, after delivery of a particular, as remained when the summons for it was returnable. *Mowbray v. Shubert*, 13 East, 508.

(a 8) *After oyer.*

A defendant has as much time in term time,—as many pleading days to plead, and no more, after oyer granted, as he had

when it was demanded. *Webber v. Austin*, 8 T. R. 356.

(a 9) *Where the rule expires on a dies non juridicus.*

Notwithstanding the day on which a rule to plead expires, is *dies non juridicus*, the defendant has not the day following to plead in. *Measure v. Britten*, 2 H. B. 616.

(a 10) *Where the process is returnable, the last return and declaration filed conditionally.*

A declaration filed *de bene esse* on process returnable the last return of the term, with notice to plead within the first four days of next term, is regular. *Abbey v. Martin*, 1 H. B. 533.

(a 11) *Mode of computing an extension of time for.*

1. Where time to plead is granted, the computation is,—inclusive of the day on which the order is dated; exclusive of that on which it expires. *Kay v. Whitehead*, 2 H. B. 35.

2. As well under an order for further time to plead as under a rule to plead, the first and last days are reckoned, both inclusive. *Freeman v. Jackson*, 1 B. & P. 479.

(b) *Of the time at which it may be filed or delivered.*

A plea in bar, filed before bail excepted to are perfected, is a nullity, and therefore not made good by perfecting bail afterwards. *Venn v. Calvert*, 4 T. R. 578. See *Dimsdale v. Neilson*, 2 East, 406.

(c) *Of the notice to plead.*

(c 1) *When given.*

Notice to plead need not be given within the same time that a declaration must be filed. *West v. Radford*, 3 Burr. 1452.

(c 2) *What not considered as.*

The delivery of a declaration indorsed “delivered conditionally” is not equivalent to a notice to plead. *Heath v. Rose*, 2 N. R. 223.

(d) *Of the rule to plead.*

(d 1) *When necessary.*

A rule to plead is not dispensed with by taking out a summons for further time

and neglecting to attend. *Decker v. Shedden*, 3 B. & P. 180.

(d 2) *Waiver of.*

A defendant may dispense with the rule to plead; as by pleading in abatement before it has been given; and if such plea be after the four days, the plaintiff may sign judgment. *Brandon v. Payne*, 1 T. R. 689.

(d 3) *Form of.*

Where the indorsement to plead is left blank as to the time, it must be taken to mean the time allowed. *Hifferman v. Langelle*, 2 B. & P. 363.

(d 4) *After an order for time.*

If a defendant obtain time to plead in Easter term, under a judge's order, which does not extend to the first day of the following term, the plaintiff may enter up judgment as of such following term, without having a new rule to plead. *Donne v. Marsh*, 1 Moore, 320.

(e) *Of the demand of a plea.*

(e 1) *When requisite.*

1. The omitting to take the declaration out of the office does not dispense with the demand of a plea. *White v. Dent*, 1 B. & P. 341.

2. In C. B. no demand of a plea is necessary, where the plaintiff enters an appearance for the defendant pursuant to the statute. *North v. Lambert*, 2 B. & P. 365; in K. B. *Palk v. Rendle*, 8 T. R. 465.

(e 2) *When not requisite.*

1. The rule that where the defendant is in custody of the sheriff, a demand of a plea is unnecessary, holds where being in such custody at the time of action brought, he afterwards, without notice to the plaintiff, changes his custody. *Wilkinson v. Brown*, 6 T. R. 524.

2. Vide *supra* (e 1) pl. 2.

3. After obtaining a judge's order for time to plead, the demand of a plea is unnecessary. *Pearson v. Reynolds*, 4 East, 571; *Burkett v. Latham*, *Ibid*.

4. After plea in abatement (or *semble* any plea) irregularly filed, and which the plaintiff treats as a nullity, the demand of a plea is not necessary previous to signing judgment as for want of one. *Andon*, 2 Smith, 393.

5. Where an order has been obtained for further time to plead, the demand of a plea is unnecessary. *Baker v. Hall*, 1 Taunt. 538.

(e 3) *When made.*

1. A plea cannot be demanded where the defendant is not in court, that is, before he has appeared, or the plaintiff has filed common bail for him. *Cook v. Raven*, 1 T. R. 635.

2. The demand of a plea may be made on delivering the declaration. *The Churchwardens of Edmonton v. Osborne*, 6 T. R. 689.

3. A demand of a plea may be made before a rule to plead is given. *Maxwell v. Skerrett*, 2 Smith, 159; 5 East, 547.

4. The demand of a plea, made before a rule to plead given, is a nullity. *Hewit v. Palmer*, 4 Taunt. 51.

(f) *Entry of, in the general issue book.*

(f 1) *The plea of solvit ad diem.*

A plea of *solvit ad diem*, concluding with a verification, cannot be entered in the general issue book. *Lockhart v. Mackreth*, 5 T. R. 661.

(g) *Of the notice of plea filed.*

(g 1) *Whether necessary, when out of time.*

The rule that a defendant must give notice of having filed a plea, only applies where he pleads out of, that is, before the regular time for pleading. *Rusholm v. Chapman*, 5 T. R. 473.

(h) *Of double pleas.*

(h 1) *Filing of.*

The rule that double pleas must be filed, is without an exception. *Harrison v. Franco*, 2 East, 225.

(h 2) *Rule for, rescission of.*

The court of K. B. under special circumstances, will rescind the rule to plead double. *Rama Chitty v. Hume*, 13 East, 255.

(i) *Of successive pleas.*

(i 1) *Election of.*

Where two pleas to the whole declaration are filed at different times on the same day, the plaintiff may act upon that last filed, and sign judgment, if it warrants him. *Samuels v. Dunne*, 3 Taunt. 386.

(*) Of pleading *de novo*.

1. Where the defendant pleads a sham plea, the court will not allow him to withdraw it and plead the general issue. *Ellis v. —*, 2 Wils. 369.

2. After the defendant has been ruled to abide by his plea, or plead such a plea as he would abide by, he cannot plead another special plea, but only the general issue, under which he may give notice of set-off. *Hare v. Lloyd*, 1 T. R. 693; *Prout v. Dewar*, Id. n.(a); *Cockran v. Robertson*, Ibid.

3. After a rule to abide by a plea, the defendant cannot withdraw a demurrer and plead *non est factum*, and also two special pleas to several breaches in covenant, although the latter pleas only tend to put the facts in issue. *Clewty v. Ramsbottom*, 3 Smith, 179.

(l) Miscellaneous.

In debt on bond, the defendant on oyer set it out truly and pleaded payment, upon which issue was taken, the defendant ruled to abide by his plea, and notice of trial given. The defendant returned the paper book, setting out a false oyer, and pleading as before; plaintiff enrolled the true condition, and demurred. The court, on an affidavit of the facts, though on the last paper day in the term, granted a rule *nisi* for striking out all the pleadings, gave the plaintiff judgment, and made the defendant's attorney pay all the costs, threatening moreover to attach him. *Ferguson v. Mackreth*, 4 T. R. 371, n. (b).

VIII. RELATIVE TO THE REPLICATION.**(a) Rule to reply.****(a 1) Preliminary steps.**

The defendant cannot, within the further period allowed to plead, rule the plaintiff to reply without giving notice of his plea. *Gandy v. Borrowdale*, 1 N. R. 273.

IX. RELATIVE TO THE REJOINDER.**(a) Rule for, when unnecessary.**

No rule to rejoin is necessary where the defendant receives the issue with the *similiter* added by the plaintiff, and does not strike it out. *Boone v. Eyrr*, 1 H. B. 254.

(b) Miscellaneous.

Where the defendant is under terms of

rejoining gratis, though the plaintiff, after tendering issue to the plea, may add the *similiter*, yet he is not bound so to do, but may demand a rejoinder. *Wye v. Fisher*, 3 B. & P. 443.

X. RELATIVE TO THE ISSUE.**(a) Entry of, of what term.**

In K. B. the issue must be entered as of the term in which it is joined. *Wood v. Miller*, 3 East, 204.

(b) Delivery of successive issues.

It is irregular to deliver a second issue without a judge's order on summons; and a trial had thereon will be set aside. *Ethersey v. Jackson*, 8 T. R. 255.

(c) Variance between the paper book and issue, when immaterial.

A variance between the paper book of the issue delivered and paid for, and the record of N. P. in stating that defendant "regarding his promise," instead of "not regarding," is immaterial. *Mather v. Brinker*, 2 Wils. 243.

(d) Acceptance of its effect.

It is too late to object to the plea roll after the defendant has accepted the issue. *Combe v. Pitt*, 3 Burr. 1686; 1 Blk. 525.

XI. RELATIVE TO THE ENTRY OF CONTINUANCES.**(a) When made.**

1. Continuances may, with leave of the court, be entered after verdict, where no injustice can result. *Doe, ex dem. Mears, v. Dolman*, 7 T. R. 618.

2. A continuance omitted in the issue book delivered, may be entered at any time on the roll. *Wilkes v. Wood*, 2 Wils. 203.

XII. RELATIVE TO COPIES OF PROCEEDINGS.**(a) Form of.**

1. An office copy of the declaration cannot be written upon both sides of single stamped paper. *Champneys v. Hamlin*, 12 East, 294.

2. It is irregular to deliver a copy of a bill or declaration with extensive obliterations, and containing under one 4 d. stamp, more folios than in practice are usually included. *Hartop v. Jukes*, 1 M. & S. 709.

XIII. RELATIVE TO COUNSEL'S SIGNATURE.

(a) *In causes conducted in person.*

The signature of counsel is equally requisite where the cause is conducted by the party in person as where by attorney. *Samuels v. Dunne*, 3 Taunt. 386.

(b) *To the plea of bankruptcy.*

In C. B. a plea of bankruptcy must have counsel's signature. *Pitcher v. Martin*, 3 B. & P. 171. *Secus*, in K. B. *Leigh v. Monticoro*, 6 T. R. 496.

(c) *To the replication in general.*

The rule of C. B. is, that where the plea must be signed by a serjeant, so must the replication likewise, unless it is merely the *similiter*. *Ellis v. Govey*, 1 B. & P. 469.

(d) *To the replication of nul tiel record.*

The replication of *nul tiel* record need not have a serjeant's signature. *Hubert v. Lord Weymouth*, 2 Blk. 816.

(e) *To the joinder in demurrer.*

There must be a serjeant's signature to a joinder in demurrer. *Brooker v. Simpson*, 2 B. & P. 336.

XIV. RELATIVE TO SPECIAL CASES AND ARGUMENTS.

(a) *Entry of.*

No special arguments to be entered the last paper day of the term. Loft. 370.

(b) *Form of.*

In a case reserved for the opinion of the court, the facts proved at the trial ought to be stated, and not the evidence of those facts only. *Palmer v. Johnson*, 2 Wils. 163.

(c) *Rules of construction in.*

In a case reserved at the trial for the opinion of the court, the court cannot infer any facts beyond those which appear therein. Thus, if a grant is required to be made to take effect in possession, which in its terms it does, and the case states that the grantor afterwards remained in possession till his death, the court cannot thence infer that the grant was colourable, and that his remaining in possession was a tacit condition understood when the

grant was executed. *Doc, ex dem. Thompson, v. Pitcher*, 3 M. & S. 407.

(d) *Alteration of.*

As a special case is settled before a jury, so it must stand. *Anon. Loft. 83.*

(e) *Proceedings on.*

If parties go to trial prepared with a case drawn for the purpose of taking the opinion of the court, the court, on arguing the case, will not allow a formal objection to be made which was not taken at the trial. *Doc, ex dem. Cooper, v. Collis*, 4 T. R. 294.

XV. RELATIVE TO THE POSTEA.

(a) *Of obtaining possession of it.*

(a 1) *Where a verdict is reduced under a reference.*

Where a verdict is reduced under a reference, the plaintiff is entitled to the *postea*, without any application to the court. *Grimes v. Naish*, 1 B. & P. 480.

XVI. RELATIVE TO NOTICES.

(a) *In whose name given and received.*

(a 1) *In the Exchequer.*

All notices in the Exchequer must be given and received in the names of clerks in court. *Calvert v. Bowater*, 1 Price, 385.

(b) *Service of,—in point of time.*

1. In C. B. notice of motion cannot be served after nine at night. *Chessell v. Parkin*, 2 Taunt. 48.

2. See the Analysis.

(c) *Irregularity in,—waiver of.*

(c 1) *By appearance.*

A defective notice is not cured by appearance. *Rex v. Croke*, Cowp. 30.

(c 2) *By delay.*

Where a notice is a nullity, the party need not apply for relief until notice of some effectual proceeding. *Moffat v. Carter*, 2 N. R. 75.

(d) *Relative to a term's notice.*

(d 1) *A term's notice, when requisite.*

1. A term's notice is not necessary to revive proceedings against a defendant who has stayed them by obtaining an injunction. *Bosworth v. Philips*, 2 Blk. 784.

2. Where proceedings are stayed for a time certain above a year, proceedings may go on at the expiration of the time,

without a term's notice. *Watkins v. Haydon*, 2 Blk. 762.

3. After a year's acquiescence, judgment, as in case of a nonsuit, may be moved for without a term's notice. *Manby v. Wortley*, 2 Blk. 1223.

4. The rule that a term's notice is requisite where no proceedings have been had for four terms together, does not apply where the delay has been occasioned by the defendant. *Bland v. Darley*, 3 T. R. 530.

5. The signing of a *consilium* is taking a step in the cause within the meaning of the rule, which requires that a term's notice be given of any intention to proceed, where the plaintiff has taken no step in the cause for four terms together. *Bland v. Darley*, 3 T. R. 530.

6. The rule requiring a term's notice where no proceedings have been had for four terms together, does not apply to a motion for judgment as in case of nonsuit. *Doe, ex dem. Phillips, v. Moses*, 5 T. R. 634.

7. Any step or proceeding within the year, though not followed up, supersedes the necessity of a term's notice; thus, a notice in Hilary vacation (within the year) that after Easter term the plaintiff would proceed in the cause; in which case, therefore, the common notice of trial, instead of a term's notice, is sufficient. *Richards v. Harris*, 3 East, 1.

8. A term's notice is not necessary where there have been no proceedings during four terms after verdict. The reason why such notice is required before verdict, is, that whilst the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice that he may prepare himself; but when the matter has passed in *rem judicatam* by the verdict, the same reason does not apply. *May v. Wooding*, 3 M. & S. 500.

(d 2) *A term's notice defined.*

After proceedings have been delayed for a year, it is not necessary to give a term's notice of intending to proceed, but only a term's notice of the next proceeding. *Smith v. Paull*, 3 Smith, 101.

(d 3) *A term's notice, how computed.*

The rule requiring that a term's notice shall be given where there have been no

proceedings for a year, comprehends the term only, and not the ensuing vacation. So that judgment may be signed in such vacation. *Milbourne v. Nizon*, 2 T. R. 40.

XVII. RELATIVE TO MOTIONS.

(a) *When proper.*

What regularly is to be had on plea, ought not to be taken upon motion. *Lofft*, 65.

(b) *Of preliminary steps to entitle to make.*

(b 1) *Putting in bail.*

A defendant arrested is not in court, and therefore cannot make any application to the court until he has put in and perfected bail; hence, until that event, he cannot move to stay proceedings in an action on a judgment pending error thereon. *Smith v. Shepherd*, 5 T. R. 9; *Bicknell v. Longstaffe*, 6 T. R. 455.

(c) *When made.*

A motion to answer the matters of an affidavit, cannot be made on the last day of term. *Jacob's case*, 4 Burr. 2502.

(d) *For a consilium.*

The paper books must be delivered to the judges before a *consilium* can be moved for. *Thelusson v. Bailey*, 2 Anst. 499.

(e) *For a re-argument in a crown cause.*

The court will not appoint a re-argument after a decision, in the absence of the crown officer, to give him an opportunity of being heard. *Rex v. Boyle*, 2 Price, 5.

XVIII. RELATIVE TO RULES IN CAUSES.

(a) *Motion for, when made.*

The court will not, generally, grant a rule to shew cause on the last day of the term, where it would operate to stay proceedings. *Anon.* 2 Price, 143. If the motion could not have been made before, they will. *M'Phedron v. Titherington*, 2 Price, 143. When it must be drawn specially for the last day. *Lofft*, 436.

(b) *Service of.*

1. Though a rule for time be not served, yet if no advantage be taken of it, the irregularity may be saved by a subsequent service. *Jans v. Hutton*, 1 Blk. 290.

2. Enlarged rules are not served, because both parties are before the court. *Anon.* 1 Smith, 199.

3. Where the name and place of abode of the attorney is mentioned in the book kept under the rule of court, K. B. Hil. 1768, service must be there. *Anon. Loft.* 357.

(c) *Proceedings on the hearing.*

The counsel obtaining a rule, against which cause is shewn in the first instance, has a reply in support of his rule. *Anon.* 4 Taunt. 690.

(d) *Of making a rule absolute.*

(d 1) *In point of time.*

An original rule cannot be made absolute until the day following that for which it is drawn up; an enlarged rule may be made absolute on the very day. *Shaw v. Masters*, 2 Taunt. 174.

(e) *Of drawing up a rule.*

One party cannot compel the other, having obtained a rule, to draw it up. *Doc. ex detn. Harcourt, v. Roe*, 4 Taunt. 883.

(f) *On the union of different matters in the same rule.*

Where an original proceeding is void, an application to set aside as well the original as proceedings subsequent, may be made by one rule; thus, to set aside proceedings against the principal and the bail; an irregular judgment and an action or execution thereon; and the like. *Baylor v. Kaye*, 4 T. R. 688. See BAIL, COSTS; JUDGMENT, &c.

(g) *Of opening a rule.*

1. If a party, after due notice of a rule, suffers it to be made absolute, he cannot open it. *Hudson v. Skinner*, 6 T. R. 596.

2. Where a plaintiff, secure of the verdict, agrees to a modification of his right, in favour of the defendant, whereupon the parties enter into a rule of court for that purpose; the rule will not be opened. *Fussell v. Sikor*, 5 Taunt. 628.

(h) *Construction of rules in miscellaneous cases.*

A consent to be bound by a verdict in one cause out of several, upon the same question, means such a verdict as the court thinks ought to stand as a final determination of the matter. *Hedson v. Richardson*, 3 Burr. 1477.

XIX. RELATIVE TO PROCEEDINGS BEFORE A JUDGE.

(a) *Of the summons.*

(a 1) *Whether a stay of proceedings.*

1. A judge's summons stays nothing, unless it be returnable before the judgment may be regularly signed. *Calze v. Lord Lyttleton*, 2 Blk. 954.

2. A summons for time to enter the issue, is, when returnable, a stay of proceedings. *Anthill v. Metcalf*, 2 N. R. 169.

3. Where bail have time to justify at chambers, a summons for further time is a stay of proceedings. *Redford v. Edie*, 6 Taunt. 240.

(b) *Of the order.*

(b 1) *Drawing up and serving it.*

1. Where a summons is obtained for time to plead, and indorsed, the defendant must draw up and serve the order, or it will be null, and the plaintiff may sign judgment. *Sedgewick v. Allerton*, 3 Smith, 559; 7 East, 542.

2. Unless the order on a judge's summons be drawn up and served, the consent indorsed is of no avail. *Joddrel v. —*, 4 Taunt. 253.

(b 2) *Construction of, — to stay proceedings.*

In K. B. a judge's order, that "upon payment of debt and costs by a certain day, proceedings should be stayed," is optional with the defendant. *Fricker v. Eastman*, 11 East, 319.

(c) *Of the course to pursue on his refusing an order.*

It is improper, after one judge has refused an application, to apply to another. Any further application should be made to the court. *Wright v. Stevenson*, 5 Taunt. 850.

XX. RELATIVE TO STAYING PROCEEDINGS.

(a) *In causes under 40 s.*

1. Proceedings will be stayed where the cause appears to be for less than 40 s. and there is an inferior jurisdiction competent to decide it. *Stean v. Holmes*; *Alcock v. Brown*, 2 Blk. 754.

2. The stat. 6 Edw. I, c. 8, prohibits suits in the superior courts for a sum under 40 s. The court, where the fact does not appear on the record, will stay the proceedings, even after notice of trial, upon an affidavit, not denied, that the demand

is for less than that sum. *Kennard v. Jones*, 4 T. R. 493; *Wellington v. Arters*, 5 T. R. 64.

3. Having delivered a bill charging the damage sustained at less than 40s. is a sufficient ground for staying proceedings in case, where the county court have jurisdiction. *Melton v. Garment*, 2 N. R. 84.

4. On a motion to set aside proceedings as *infra dignitatem*, on an affidavit that the demand sued for does not amount to 40s. the court will not inquire into the amount, if an affidavit be put in, on shewing cause, that the demand exceeded that sum, but will at once discharge the rule with costs. *Branker v. Massey*, 2 Price, 8.

(b) *Miscellaneous grounds of.*

1. If an action be brought collusively, to obtain the opinion of the judges upon a doubtful question; on discovery, proceedings will be stayed. *Tonson v. Collins*, 1 Blk. 301; 4 Burr. 2327.

2. Proceedings will not be stayed until satisfaction of a former judgment obtained by defendant. *Cooke v. Dobree*, 1 H. B. 10.

3. The pendency of a bill in chancery for the same cause, is no ground for staying proceedings. *Murphy v. Cadell*, 2 B. & P. 137. Nor the pendency of a petition in parliament. *The Gray's Inn case*, Loft. 436.

4. C. B. will not stay proceedings to abide the judgment of the mayor's court, in an action for the same property. *Smidt v. Ogle*, 6 Taunt. 74.

(c) *Pending proceedings in another court.*

A plaintiff will be restrained proceeding for the same cause in another court pending a consolidation rule under which his action has been stayed. *Parkin v. Scott*, 1 Taunt. 565.

(d) *Pending an order made by another court.*

Where pending an order made by one court, a party sues in another, the latter cannot stay the proceedings. *Stevenson v. Watson*, 1 B. & P. 365.

(e) *In actions of property.*

(e 1) *Terms of.*

In replevin or trover, or the like, it is a matter of course to stay proceedings upon payment of costs, and of the distress, and

delivering up the replevin bond, in the first case, and upon payment of costs and restoring the goods, in the other; unless the plaintiff elects to proceed for the special damage. *Banks v. Brand*, 3 M. & S. 695.

(f) *Relative to the performance of the conditions of.*

A proceeding stayed, or set aside on terms, may continue on until the terms are performed. *Dodsley v. Lady Hamilton*, 5 Taunt. 1.

XXI. RELATIVE TO SETTING ASIDE PROCEEDINGS.

(a) *Whether in whole or part.*

In C. B. where the plaintiff delivers a declaration after being out of court from neglecting to declare before the end of the second term, the declaration only, not the process, will be set aside. *Wynne v. Clarke*, 5 Taunt. 649.

XXII. ON THE WAIVER OF RIGHTS CONNECTED WITH.

A defective plea, whether in itself, the manner in which it is delivered, or otherwise, is equally a waiver with a valid one of rights, on which the defendant might have insisted; such as a right to imparl, and of a rule to plead. *Lockhart v. Mackreth*, 5 T. R. 661.

XXIII. ON THE WAIVER OF IRREGULARITIES.

(a) *By delay.*

1. A party does not waive an irregularity, if he applies as soon as he has an opportunity. *Smith v. Painter*, 2 T. R. 719.

2. In mere matters of practice delay is an answer to any objection of irregularity. *Petrie v. White*, 3 T. R. 10; Loft. 236, 323, 333.

3. The general rule is, that a party in a cause, waives an irregularity, unless he objects to it in the first instance. *Goodwin v. Parry*; *Same v. Smith*, 4 T. R. 577.

4. Where the proceedings in a cause are not merely irregular but void, the objection need not be taken in the first instance; as where A. has been holden to bail, on a single affidavit against himself and B, for separate causes of action. *Hutney v. Wilson*, 5 T. R. 264.

5. A party waives an irregularity by neglecting to object until his adversary

has taken a further step in the cause. *Downes v. Witherington*, 2 Taunt. 243.

6. If a party lies by after an irregularity in the proceedings, and knowingly permits the other to take a further step in the cause, before he moves to take advantage of the irregularity, it is as much a waiver of the irregularity as taking a step himself would be. *Gaire v. Goodman*, 2 Smith, 391.

7. All motions to annul proceedings on the ground of irregularity, must be made in the term when the proceeding was had, or the court will not receive the application. *Anon.* 3 Price, 37.

(b) *By defective pleadings.*

A plea that in the plaintiff's election may be treated as a nullity, is a waiver of antecedent irregularities. *Perry v. Fisher*, 6 East, 549.

XXIV. RELATIVE TO DISCONTINUANCE.

(a) *After a special verdict.*

A discontinuance will not be allowed after a special verdict, in order to adduce fresh proof in contradiction to the verdict. *Roe, d. Gray, v. Gray*, 2 Blk. 815.

(b) *Concerning taxation and payment of costs.*

1. A suit is not regularly discontinued so as to warrant a second action for the same cause, until the costs have been taxed and paid. A tender by the plaintiff, before taxation, of a sum sufficient to cover the costs, is of no avail. *Molling v. Buckholtz*, 3 M. & S. 153.

2. Where an order is obtained for staying proceedings on payment of a sum and costs; the plaintiff may take out the money, and on nonpayment after taxation, may proceed without any previous demand. *Smith v. Smith*, 2 N. R. 473.

(c) *Of appointing a taxation.*

Service of a rule to discontinue, without an appointment to tax the costs, is not of itself a discontinuance of the action. *Whitmore v. Williams*, 6 T. R. 765.

(d) *Of discharging a rule for.*

(d 1) *Grounds of.*

Side-bar rule to discontinue, obtained after the bail had justified, discharged to meet an unfair attempt. *Belkier v. Gamzell*, 4 Burr. 2502.

XXV. RELATIVE TO THE CONTINUANCE DAY.

In K. B. the continuance day is a day fixed by the master at his discretion after each term, regulated by the convenience of the officers of the court, for the dispatch of business. *Pearson v. Rawlings*, 1 East, 405.

XXVI. RELATIVE TO THE PAPER BOOK.

(a) *Time allowed for returning.*

On a rule to return the paper book on a particular day, it must be returned some time in that day, otherwise the other party may sign judgment without waiting till the opening of the office the morning following. *Haselar v. Ansell*, Dougl. 197.

XXVII. OF THE EQUITABLE JURISDICTION OF THE COURT.

(a) *Of the conditions on which it will be exercised.*

(a 1) *Agreement not to file a bill in equity.*

The condition of filing no bill in equity will not be imposed, where the bill is essential to the justice of the case. *Grimstone v. Bell*, 4 Taunt. 254.

(a 2) *Agreement to admit assignments in bankruptcy.*

The court, in imposing terms, will require that an assignment in bankruptcy be admitted. *Read v. Cooper*, 5 Taunt. 89.

XXVIII. OF CASES SENT FROM A COURT OF EQUITY.

(a) *From the rolls.*

The court will certify their opinion on a case sent from the Rolls. *Daintry v. Daintry*, 6 T. R. 307.

(b) *The argument thereon regulated.*

Where a case is sent for the opinion of the court, they will only hear one counsel for each separate interest, though the parties who have a common interest, be placed adversely to each other in the suit. *Bettison v. Rickards*, 2 Marshall, 413; 7 Taunt. 105.

XXIX. OF THE PRACTICE AT NISI PRIUS.

(a) *Of the right to reply.*

The production by the defendant of a rule to pay money into court, does not entitle the plaintiff to a reply. *C. B. Hill*, 50 Geo. III; 2 Taunt. 267.

(b) *Of opening a case after it has been closed.*

After a plaintiff has closed his case, and that of his adversary has been opened, it is in the judge's discretion whether to allow an additional claim to be made. *Edwards v. Sherratt*, 1 East, 604.

(c) *Of retracting admissions at.*

If a party at the trial, admitting a fact, disputes the legal result, and the decision is against him, he cannot afterwards go to the jury upon the existence of the fact. *Biggs v. Lawrence*, 3 T. R. 454.

XXX. OF RULES OF COURT.

(a) *In K. B.*(a 1) *Relative to the service of rules.*

Rule as to the time for serving rules, &c. K. B. Mich. 41 Geo. III; 1 East, 132.

(a 2) *Relative to the enlarging of rules.*

Rule as to enlarging of rules, K. B. Hil. 6 Geo. III; 3 Burr. 1842.

(a 3) *Relative to entering and setting down cases for argument.*

Rule as to the entry and setting down of special cases for argument. K. B. Mich. 38 Geo. III; 7 T. R. 454.

(a 4) *Relative to paper books on argument.*

Rule as to the time for delivering paper books in cases entered for argument. K. B. Trin. 40 Geo. III, 1 East, 131.

(a 5) *Relative to causes in the peremptory paper.*

Rule as to the disposal of causes in the peremptory paper. K. B. East, 41 Geo. III, 1 East, 496.

(a 6) *Relative to proceedings before the master.*

Rule relative to proceeding on an appointment by the master. K. B. Hil. 32 Geo. III, 4 T. R. 580.

(a 7) *Relative to the attendance on a judge's summons.*

Rule, regulating the duration of attendance on a judge's summons. K. B. Trin. 35 Geo. III, 6 T. R. 402.

(a 8) *Relative to counsel's signing interrogatories.*

Rule relative to the counsel's signature

to interrogatories. K. B. Mich. 34 Geo. III, 5 T. R. 474.

(a 9) *Relative to the seal office.*

Rule of the K. B. regulating the opening of the seal office. Trin. 54 Geo. III. 3 M. & S. 163.

(b) *In C. B.*(b 1) *Relative to the filing of the declaration.*

By a rule of C. B. Hil. 35 Geo. III, the plaintiff may file his declaration on the last return of the term, or on the day after such return; and, if that fall on a *Sunday*, then on the *Monday*, without entitling the defendant to an imparlance. And this rule applies equally to *Easter* term as to any other. *Crew v. Atwood*, 2 Marshall, 337; 7 Taunt. 70.

(b 2) *Relative to the notice of the declaration.*

Rule of C. B. relative to notice of declaration filed conditionally. East, 49 Geo. III, 1 Taunt. 616.

(b 3) *Relative to the affidavit of the delivery of the declaration.*

The rule of C. B. East, 5 W. & M. requiring an affidavit of the delivery of declaration to be filed within twenty days afterwards, does not extend to a declaration delivered by way of detainer. *Davis v. Davenport*, 2 B. & P. 72.

(b 4) *Relative to the time for pleading.*

Rule of C. B. as to the time allowed for pleading, where the process is returnable the last return of the term. Hil. 35 Geo. III, 2 H. B. 550.

(b 5) *Relative to paper books on argument.*

1. Rule as to the delivery of paper books to the judges, on special arguments. C. B. Mich. 49 Geo. III, 1 Taunt. 412.
2. Rule as to entering exceptions in the margin of paper books. C. B. Hil. 48 Geo. III, 1 Taunt. 203.

(b 6) *Relative to the seal office.*

Rule relative to the opening of the seal office. C. B. Trin. 54 Geo. III, 1 Mars. 345; 5 Taunt. 702.

(c) *In the Exchequer.*(c 1) *Relative to the calling on of causes.*

Rule of the Exchequer relative to the

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(c) *Construction of*, p. 802.

I. VALID OR VOID.

(a) *General rule*.

The general rule with regard to prescriptive claims is, that every such claim is good, if by possibility it might have had a legal commencement. An exception to this rule is, the claim of toll thorough, where it is necessary to shew expressly for what consideration it was granted; though there seems to be no reason for the exception. *Lord Pelham v. Pickersgill*, 1 T. R. 667.

II. HOW DISPROVED.

(a) *Whether by an antient grant without date*.

An antient grant without date, does not necessarily destroy a prescriptive right. *Addington v. Clode*, 2 Blk. 989.

III. PLEADINGS RELATIVE TO.

(a) *Disclosure of title in a plea*.

In a plea claiming a prescriptive right as appurtenant to the defendants's estate, he must state his title. *Rider v. Smith*, 3 T. R. 766. See *English v. Burnell*, 2 Wils. 258. *Supra*, PLEADING.

(b) *Traverse of a prescriptive right*.

If a prescriptive right be pleaded, the whole, and not a part only, must be traversed by the replication. *Morewood v. Wood*, 4 T. R. 157.

(c) Construction of.

Where a prescriptive right is claimed at all times; the meaning is, at all usual times. *Brook v. Willett*, 2 H. B. 224.

PRINCIPAL AND ACCESSARY.

I. PRINCIPAL.

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I. PRINCIPAL.

(a) *In the second degree*.

(a 1) *Who considered as*.

On a special verdict, principals in the second degree cannot be affected, unless the jury find expressly that they were actually present, or that some acts were done by them, which unavoidably shew that they were present, or that they were of the same party, on the same pursuit, and under engagements and expectation of mutual defence and support from the person who did the fact. *Rex v. Borthwick*, Dougl. 207.

II. ACCESSARY.

(a) *Indictment of*.

(a 1) *Averment of the principal's guilt*.

In an indictment against an accessary, it is sufficient to state that the principal was convicted, without averring that he committed the crime. 7 T. R. 465.

(a 2) *Construction of*.

An indictment against an accessary, stating that the principal offence was committed by a person or persons unknown, is equivalent to saying that the principal has not been convicted. *Rex v. Barter*, 5 T. R. 83.

PRINCIPAL AND AGENT.

First.

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First.

[A] *On the relation of principal and agent.*

I. WHEN AND HOW ESTABLISHED.

(a) *By the retainer of an agent.*

A middle-man, who has retained a sub-agent for his principal, is not liable for the sub-agent's misconduct; since he is the mere instrument by which a contract between two was made. *Stone v. Cartwright*, 6 T. R. 411.

(b) *By a remittance.*

1. A remittance by bills, directing payment to a third person out of the proceeds, when received, will not render the receiver liable to such third person against his consent. *Williams v. Everett*, 14 East, 582.

2. A general remittance to bankers to whom the receiver is indebted, accompanied by a letter, requesting them to pay certain specific sums to particular persons (not expressly out of the sum remitted), does not so fix the bankers as to give the persons to whom such sums were so directed to be paid, a right of action against them for money had and received, without an assent, on their part, to such an appropriation of the money remitted. An express dissent by the bankers is not necessary to protect them. *Grant v. Austen*, 3 Price, 58.

(c) *By a payment in trust to discharge a contract made by an agent.*

Though an agent will not be chargeable on a contract made by him as such, yet, if he receives money from his principal to satisfy it, he becomes bailee to the other party's use, and liable to him for the money received. *Myrtle v. Beaver*, 1 East, 135; *Price v. Chute*, Id. 579.

(d) *By permitting a vendor of land to remain in possession.*

Alienor of land, continuing in possession.

sion, is evidence of authority from the alienee to do acts binding upon the property. *Taylor v. Waters*, 7 Taunt. 374.

(e) *Miscellaneous.*

In an action for usury in discounting a bill, where it was proved that one Brown demanded payment of the acceptor, and commenced an action against him to compel payment; in consequence of which, a person on behalf of the acceptor, paid to Brown the amount of the bill and the costs of the suit; on producing the bill for which Brown gave a receipt, as the attorney for the defendant; and no account was given how Brown came by the bill. Held, that there was sufficient evidence to be left to a jury, that Brown acted as the defendant's agent; and consequently that the defendant had received usurious interest. *Owen v. Barrow*, 1 N. R. 101.

II. UNDER A COMMISSION DEL CREDERE.

(a) *Nature of the relation.*

The phrase "a commission *del credere*," is commonly used to express the contract, by which the broker guarantees the solvency of the purchaser. But, strictly speaking, it means the premium,—the commission,—paid to the broker for guaranteeing the purchaser. *Morris v. Cleasby*, 1 M. & S. 576; 4 M. & S. 574.

Secondly.

[B.] *On the Rights and Liabilities of Principal and Agent inter se.*

I. OF ACTIONS BY PRINCIPAL AGAINST AGENT.

(a) *For misconduct.*

(a 1) *Form of.*

The remedy against an agent for selling under the fixed price, is, not trover, but a special action. *Dufréme v. Hutchinson*, 3 Taunt. 117.

II. OF THE RIGHTS OF AGENT AGAINST PRINCIPAL.

(a) *In relation to commission.*

Where the commission payable to a broker for chartering a ship, is a percentage on its freight, the amount of which is contingent, he cannot sue until the contingency is determined. *Winter v. Mair*, 3 Taunt. 531.

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(b) *To dispute the principal's title.*

A. consigns goods to B. abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to A.'s captain, B. stating it to be on A.'s account, as A.'s own goods, and to be delivered to A. The return cargo consisting of more goods than the proceeds of those consigned to B, B. draws bills on A. for the difference, which he sends to his agent, with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refuses to accept the bills, and the bill of lading is accordingly indorsed to C. The ship arrives, and C. demands the cargo as indorsee of the bill of lading; the captain, however, refuses, and delivers them to A, who deposits them with D, as his warehouseman. D. then receives notice from B, to hold the goods for B. as his property, in consequence of which, D. refuses to re-deliver them to A. In trover by A. against D, held, that D. was not estopped by having received the goods as the warehouseman of A. from setting up the claim of a third person as a defence, supposing that claim to be a good one. *Ogle v. Atkinson*, 1 Mars. 323; 5 Taunt. 759.

(c) *On neglect of the principal to fulfil a contract with a third person.*

If a principal refuses payment upon a contract made through his agent, and the agent not being himself liable, but for the sake of his own character which would be affected by the discredit of his principal, chuses to pay the money of his own accord, he cannot recover it, though the principal might himself have been compelled to pay it in the first instance. It would be otherwise, however, if the agent were, expressly or impliedly, (as by the usage of the trade,) a guarantee for the fulfilment of the contract by his principal. *Child v. Morley*, 8 T. R. 610.

(d) *Lien of.*

(d 1) *General rule.*

The debt, in respect of which a lien is claimed by an agent, must be due to him in his own right, and not as agent for another. *Houghton v. Matthews*, 3 B. & P. 485.

(d 2) *For his general balance.*

An agent has not any general lien in
M

respect of debts incurred prior to the time at which he begins to be employed in that character. *Houghton v. Matthews*, 3 B. & P. 485.

(d 3) *On a specific deposit.*

Where a factor receives goods for a specific purpose, such as to sell and pay over the proceeds, he has not that lien on them for his general balance, to which, on a general deposit, he would be entitled. *Walker v. Birch*, 6 T. R. 258.

(d 4) *On becoming surety for principal.*

A factor who becomes surety for his principal, has a lien on the price of the goods sold by him for his principal, to the amount for which he has become surety. *Drinkwater v. Goodwin*, Cowp. 251.

(d 5) *Discharge of, by pledging.*

Where a factor having a lien upon goods, pledges them to his creditor for a debt, without notice of such lien, and without any express intention at the time of making the lien the subject of pledge, the pawnee of the goods cannot take advantage of this lien in defence to an action of trover at the suit of the owner. *McComb v. Davies*, 3 Smith, 3; 7 East, 5.

III. OF THE REVOCATION OF THE AGENT'S AUTHORITY.

(a) *By death of the principal.*

If, whilst goods are *in transitu* from a principal to his agent, the principal dies, whereupon the executor directs the carrier to follow his former orders, who, in consequence, delivers them to the agent; the agent has the same lien thereon as he would have had, had the death not intervened. *Hammond v. Barclay*, 2 East, 227.

IV. OF THE AGENT'S DUTIES TOWARDS THE PRINCIPAL.

(a) *General rule.*

An agent is not liable for disobeying his instructions, if obedience to them would not have secured the principal from the loss sustained. Thus, for neglecting to insure a ship which had been guilty of deviation. *Delaney v. Stoddart*, 1 T. R. 22.

(b) *To insure.*

Where a principal abroad has a right, or has been induced to expect that his correspondent here will obey an order to

insure, the correspondent is liable for neglecting it. As, 1. Where he has effects in the correspondent's hands:—2. Where, though he has no effects, yet the course of dealing has been for the correspondent to insure on receiving the order; since he has a right to suppose that it is to be continued, the correspondent not having discontinued it by notice:—3. Where the merchant sends bills of lading with an order to insure, and the correspondent retains the bills; since the commission being entire, he cannot adopt one part and reject the other. *Smith v. Lascelles*, 2 T. R. 187.

(c) *On a purchase.*

A broker who purchases goods upon credit, is bound to forward them to his principal in the ordinary course of dealing; which, if he does not, he has no claim upon the principal who refuses to accept them. *Hurst v. Holding*, 3 Taunt. 32.

(d) *On receiving payment.*

1. An agent to whom a bill is remitted is justified in receiving payment by a check; and therefore is not answerable, though it is dishonoured. *Russell v. Hankey*, 6 T. R. 12.

2. An agent who has a general authority to receive payment, which is a question purely of fact, may, without collusion, receive it in what manner he chooses, so as to acquit the debtor, provided it be such as the course of trade warrants. *Tavene v. Bennett*, 11 East, 36.

(e) *Miscellaneous.*

Where a banker is instructed by the acceptor of a bill received from a customer, to countermand payment, he is not bound to acquaint the customer therewith. *Crosse v. Smith*, 1 M. & S. 545.

V. OF THE AGENT'S LIABILITIES TOWARDS THE PRINCIPAL.

(a) *On contracts del credere.*

Where an agent contracts under a commission *del credere*, the principal has two securities: 1. The agent: 2. The contracting party. And he may sue the broker, without a demand first made upon the contractor. *Grove v. Dubois*, 1 T. R. 115.

(b) *On a bill or note.*

A. employs B. to sell goods for him. C, as B's broker, procures a purchaser,

and draws a bill for the amount, payable to A, which is accepted by the purchaser, but dishonoured. Held, that C. is answerable to A, as drawer of the bill. *Le Feuvre v. Lloyd*, 1 Mars. 318; 5 Taunt. 749.

(c) *Liabilities of joint agents for each other.*

Joint factors, when consignees, are each answerable for the other. *Godfrey v. Saunders*, 3 Wils. 114.

VI. ON THE CONSTRUCTION OF CONTRACTS MADE BY AGENT WITH PRINCIPAL.

(a) *For indemnification on a re-sale.*

An agreement by a broker with his principal, to indemnify him from any loss on the re-sale of goods purchased through the intervention of the broker, imports an engagement or insurance that he shall have the opportunity of selling at the same price, and that if it does not offer, that the broker will make good the difference. *Curry v. Edensor*, 3 T. R. 524.

VII. ON THE RIGHTS OF A SUB-AGENT AGAINST THE PRINCIPAL.

(a) *For charges or remuneration.*

1. Where A. employed a surveyor in the way of his trade, who ordered goods from B, for the work in hand, A. was held liable to B. *Bramah v. Lord Abingdon*, 15 East, 66.

2. A subordinate agent, employed to do parts of work contracted for by the superior agent, cannot sue the principal. *Cull v. Backhouse*, 6 Taunt. 148, n.

3. A, on the recommendation of his agent, employs B. to convey goods from this country to the continent. B, without the knowledge of A, employs C. to transact the business, and the goods are accordingly shipped by C, and landed on the continent by C's agents. Held, that there was no privity between A. and C, and therefore that C. was not entitled to recover his charges, or those of his agents, from A, though A. had not paid the amount to B. *Schondling v. Tomlinson*, 1 Mars. 500; 6 Taunt. 147.

4. A. consigns goods to B, with directions to pay over the net proceeds to C. B. employs D. to dispose of them. In an action by C. to recover the proceeds from D, D. is entitled to make the same

deductions for freight, &c. as B, who was the owner of the ship in which the goods were brought, might have made. *Blackburn v. Kymer*, 1 Mars. 223; 5 Taunt. 584, 672.

(b) *Lien of.*

A principal employs a broker, from the opinion he entertains of his personal skill and integrity; the broker, therefore, without some custom in the particular trade, of which, as the principal knows of it, he may be supposed to approve, cannot place the interests of his principal in the hands of another; and if he does, that other can, by his interference, acquire no rights against the principal. A. consigns goods to B; B. being in embarrassed circumstances, and not having funds of A.'s to discharge freight and duties, applies to C. to take charge of the consignment, sell it, having first paid the freight and duties, B. agreeing to divide the commission with him. Held, that C. had no lien on the property against A. for the sum advanced, and therefore that A. might recover in trover the full amount of the goods, without a deduction for the allowance. *Solly v. Rathbone*, 2 M. & S. 298. Same principle, *Cockran v. Irlam*, 2 M. & S. 301, n. (a).

VIII. ON THE LIABILITIES OF A SUB-AGENT TOWARDS THE PRINCIPAL.

(a) *On a deposit.*

A. having received money as agent for B. and others, in specific proportions for each, pays it over to C. as a banker, in his own name, and having drawn out part of it, directs C. not to pay away the remainder, except by his order. Held, that C. is bound to hold the money for A, and that therefore B. cannot recover the remainder of his share from C, though he had given C. notice that A.'s agency was at an end. *Pinto v. Santos*, 1 Mars. 132; 5 Taunt. 147.

Thirdly.

[C] *On the Rights and Liabilities of Principal and Agent, with reference to third persons.*

I. ON THE INDIVIDUALITY OF.

1. An agent and his principal are to be considered as one and the same person. *Caldwell v. Ball*, 1 T. R. 205.

2. The actions and knowledge of an

agent are those of his principal. *Fitzherbert v. Mather*, 1 T. R. 12.

3. The act of an agent is that of his principal; so that the fraud of the agent, though unknown to the principal, vitiates the transaction. *Doe, ex dem. Willis, v. Martin*, 4 T. R. 39.

4. Payment to an agent or servant, usually accustomed to receive for the principal, is payment to the principal. *Secus*, to a servant not so accustomed; or where the payment is upon a special account, not to be presumed within the nature of the servant's authority, unless expressly given by the master. *Crosser v. Miles*, Loft. 593.

II. WHERE THE CREDIT IS GIVEN TO THE AGENT.

(a) General rule.

1. Sometimes contracting parties agree that the agent, and not his principal, shall be answerable, when the contract being made by the agent as principal contractor, he alone is liable thereon. If, therefore, the seller of goods, knowing that the buyer, though dealing with him in his own name, is in fact only agent for another, debits him, he cannot afterwards sue the principal. *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574; *Macbeath v. Haldemand*, 1 T. R. 173.

2. Sometimes, by the usage of trade, the credit on a sale is understood to be given to the agent or buyer; an usage which obtains in the case of a foreign principal. *Paterson v. Gandasequi*, 15 East, 62.

(b) Example.

If A. purchases goods of B, for the purposes of re-selling them to C, charging him a commission, B. cannot recover the price from C, although C. selects the goods, and stipulates the terms on which B. shall sell. *Addison v. Gandasequi*, 4 Taunt. 574.

III. ON THE DISCHARGE OF ONE, BY ELECTING THE OTHER.

(a) In the case of a dormant principal.

Where there is a choice between a dormant principal and his agent, the opposite party, by electing one as liable to his claim, discharges the other. 15 East, 65.

IV. ON THE PRINCIPAL'S LIABILITY FOR HIS AGENT'S ACT OR CONTRACT.

(a) General rules.

1. A principal is bound by the act of his agent, where his former course of dealing sanctions the inference that the agent had authority for his conduct, though in fact it was contrary to his directions. *Whitehead v. Tuckett*, 15 East, 400.

2. The sale by a broker, whose ordinary business it is to sell, of goods placed by the owner in his possession generally, is binding. *Pickering v. Busk*, 15 East, 38.

3. Sale by one who had fraudulently obtained the means to hold himself out as owner, held good against the principal. *Twinger v. Samuda*, 7 Taunt. 265; 1 Moore, 12.

(b) The contract of a general agent.

A general agent,—the factor for example of a principal abroad,—may, by exceeding his instructions, bind his principal. *Fenn v. Harrison*, 3 T. R. 757.

(c) The contract of a special agent.

A special agent, that is, one constituted such for a particular purpose, and under a limited and circumscribed power, cannot go beyond his instructions. *Caldwell v. Ball*, 1 T. R. 205; *Fenn v. Harrison*, 3 T. R. 757.

(d) A contract of guarantee.

1. If the holder of a bill give it to an agent to get it discounted, he is bound by the agent's guaranteeing its payment, unless he told him that he would not warrant the bill, as by saying that he would not indorse it. *Fenn v. Harrison*, 4 T. R. 177.

2. A guarantee, given by an agent unknown to his principal, confers no right either of stoppage *in transitu* or lien. *Gurney v. Sharp*, 4 Taunt. 242.

(e) The contract of an agent whose authority has been recalled.

Acts by an agent, whose authority has been revoked, are binding upon the principal until notice of the revocation. *Salte v. Field*, 5 T. R. 215.

(f) From a subsequent promise.

If a principal is not bound by his agent's contract, a subsequent promise to be

answerable, is *nudum pactum*. *Fenn v. Harrison*, 3 T. R. 757.

(g) *Discharge of principal by dealings with agent.*

A receipt given by the creditor to an agent or broker, does not necessarily of itself operate as a discharge to the principal; nor has it that effect, unless the principal appears to have dealt differently with his agent in consequence of the receipt, as by passing it in his accounts, and giving him further credit upon the faith of that voucher: *Wyatt v. The Marquis of Hertford*, 3 East, 147.

(h) *For the criminal act of the agent.*

If an agent or attorney is empowered by the principal to adopt such measures as may secure his claim against a debtor, and the measures adopted are unlawful, the principal is not liable, unless he was actually privy to them. *Meux v. Howell*, 4 East, 1.

(i) *For the tortious act of a sub-agent.*

A. having a house by the way-side, contracted with B, a surveyor, to repair it for a fixed sum, who engaged C. to do the work, and C. contracted with D. to furnish the materials, whose servants in bringing them, through negligence, injured the plaintiff. Held, that the several retainers were under an implied authority from A, who therefore was liable for the damage occasioned. *Bush v. Steinman*, 1 B. & P. 404.

V. OF EVIDENCE IN ACTIONS AGAINST THE PRINCIPAL.

(a) *Admissions by the agent.*

The acts of an agent, as such, are the acts of his principal. Therefore, in suits by or against the principal, verbal or written admissions by the agent, may be given in evidence, without producing him. *Biggs v. Lawrence*, 3 T. R. 454.

(b) *The agent's letters.*

An agent's letters are not evidence. *Reyner v. Pearson*, 4 Taunt. 662.

(c) *The agent's narrative.*

1. An agent's narrative is not evidence against the principal. *Langhorn v. Allnutt*, 4 Taunt. 511.

2. The letters of an agent in a foreign country, detailing the contents of letters from another agent, are not evidence against the principal. *Kahl v. Jansen*, 4 Taunt. 565.

VI. OF THE UNAUTHORIZED ACTS OF THE AGENT ENURING FOR THE PRINCIPAL'S BENEFIT.

(a) *The act of exchanging the principal's property.*

If an agent exchanges, without authority, the property of his principal, the property given in exchange will belong to the principal. The rule is a rule of natural justice, and there is no principle of law which requires that in this particular case justice should be sacrificed to a general rule. Besides, there is this principle of law in its favour, that a man shall never be a gainer by his own misconduct. *Taylor v. Sir Thomas Plumer*, 3 M. & S. 562.

VII. ON THE RIGHTS OF THE AGENT.

(a) *To stand in the place of his principal.*

1. An agent cannot sue on a simple contract expressed to have been made with him as such. Hence, where A. agreed in writing to pay the rent of certain tolls "to the treasurers of the commissioners of X," and the treasurer sued on the agreement, the defendant had judgment. *Pigott v. Thompson*, 3 B. & P. 147.

2. A broker selling goods as a principal, without disclosing his employer's name, does not, so far as his own interests are concerned, thereby acquire to himself the rights and character of a principal; not though he be acting under a *del credere* commission, since thereby he only guarantees the solvency of the purchaser, without acquiring an interest in the property greater than in common cases. *Semble, Morris v. Cleasby*, 1 M. & S. 576; 4 M. & S. 566. It follows from the above, that the price of the goods cannot be considered as a debt due to the broker, and therefore, cannot be set off by him as such in an action brought for a debt due to the purchaser; nor as mutual credit in a suit by the purchaser's assignees after his bankruptcy. *Semble, Morris v. Cleasby*, 1 M. & S. 576; 4 M. & S. 566. But clearly there cannot be such set-off where the broker, without expressly disclosing his principal's name, sufficiently intimates that

he is acting only as broker; or without declaring it at the time of sale, does so before any steps have been taken to carry the contract of sale into effect. *Morris v. Cleasby*, 1 M. & S. 576; 4 M. & S. 566.

3. The circumstance that a broker is acting under a *del credere* commission from his principal, thereby guaranteeing to his principal the solvency of the contractor, does not invest him with the rights of his principal where the contract is made in the name of the principal, or being made in the broker's name, the circumstance that he is only acting as agent is unknown to the contractor. *Alister*, where the contractor knows that fact, and makes the contract with the broker as principal. Though in this latter case the principal may interfere, unless the broker has a lien, or has made payment. *Koster v. Eason*, 2 M. & S. 112.

(b) *To pledge.*

1. A factor cannot pledge the goods of his principal; so that the principal may recover them from the pawnee by a tender to the factor, without any to the pawnee, of his balance. *Daubigney v. Duval*, 5 T. R. 604.

2. Where goods from abroad are consigned to a factor to sell under a bill of lading, though he may indorse the bill to a vendee, yet he cannot assign it merely as a pledge. *Newson v. Thornton*, 2 Smith, 207; 6 East, 17.

3. A factor cannot pledge the goods of his principal, though the pawnee is ignorant that he is not the owner, and though the bill of lading under which they have been consigned is general. *Martini v. Coles*, 1 M. & S. 140. Unless where the principal has held him forth as the owner. *De Leira v. Edwards*, Id. 147.

VIII. ON THE AGENT'S AUTHORITY.

(a) *How executed.*

(a 1) *In his own name, with the consequences.*

1. It is no breach of the duty of a broker (of London) to contract in his own name for the goods he is employed to purchase, being instructed so to do. *Kemble v. Atkins*, 7 Taunt. 260; 1 Moore, 6.

2. That a principal may be liable on a deed executed by his attorney, the execution must be in his name. *White v. Cuyler*, 6 T. R. 176.

3. To secure an agent from liability on a deed made by him as such, it must distinctly express, that he is only acting therein as agent, since no evidence to controul its purport will be received. This may be done by writing opposite the seal "for C. D. [the principal] A. B." [the attorney.] *Wilks v. Back*, 2 East, 142.

4. Where one covenanted for himself, his heirs, &c. and under his own hand and seal for the act of another, he was held personally liable, though the deed described him as covenanting for and on behalf of that other. *Appleton v. Bincks*, 5 East, 148; 1 Smith, 361.

(b) *Deputation of,*

(b 1) *What is or is not.*

Signing an agent's name by his direction, is not a deputing of his authority. *White v. Proctor*, 4 Taunt. 209.

IX. ON THE AGENT'S LIABILITIES.

(a) *On contracts by him as such.*

An agent is not liable on a contract under seal made by him expressly on account of his principal. *Unwin v. Wolseley*, 1 T. R. 674. Vide *supra*, VIII. (a 1.)

(b) *When contracting on behalf of government.*

An agent avowedly contracting on behalf of government, is not liable on the contract, whether under seal or by parol. *Macbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, Id. 674.

(c) *On accepting a bill.*

A bill drawn on a factor, and payable out of the produce of goods in his hands, after discharging prior acceptances, and accepted by him generally, is chargeable on him, notwithstanding any balance then due to him in a running account with his principal. *Maber v. Massias*, 2 Blk. 1072. Vide *supra*, 173, IV. (d 1).

(d) *When discharged or not, by a payment over.*

(d 1) *General rules.*

1. Money had and received, will not lie against a known agent or receiver for money paid voluntarily to such agent for the use of his principal, unless he had notice to retain before payment over. *Sadler v. Evans*, 4 Burr. 1986.

2. An agent is liable for paying over money after notice. *Buller v. Harrison*, Cowp. 566.

3. Where money to which the principal is not entitled, is paid to an agent by compulsion, he is not discharged by a payment over. *Snowdon v. Davis*, 1 Taunt. 359.

(d 2) *What considered a payment over.*

1. If a party who has paid money to an agent on account of his principal, becomes entitled to recalc it, he may sue the agent, provided no change since the payment has taken place in his situation. Merely forwarding his account to his principal accrediting him with the payment, is not an alteration. *Cox v. Prentice*, 3 M. & S. 344.

2. The mere passing of money on account, or making rest without any new credit given, fresh bills accepted or further sum advanced for the principal in consequence of it, is not equivalent to a payment over. *Buller v. Harrison*, Cowp. 565.

X. ON THE EVIDENCE IN ACTIONS AGAINST THE AGENT.

(a) *Admission of parol evidence to explain a written contract.*

The Statute of Frauds does not preclude evidence that a written contract to buy goods was on the buyer's side made by him as agent for another. *Wilson v. Hart*, 7 Taunt. 295; 1 Moore, 45.

XI. ON THE RIGHTS OF THIRD PERSONS.

(a) *To a set-off against the principal.*

Where a factor (here, *del credere*) sells goods without naming his principal, or intimating that he is acting for another, the buyer, ignorant of that circumstance, may set off against the principal's suit any demand which he had against the factor. *George v. Clagett*, 7 T. R. 359; *Rabone v. Williams*, Id. 360, n.

(b) *Third persons, when estopped disputing the principal's title.*

(b 1) *In the case of an agreement between successive vicars and churchwardens.*

An agreement having existed between the successive vicars and churchwardens of a parish, that certain fees should be taken upon the burial of strangers in the churchyard, and divided equally between them; the in-coming vicar refuses to accede to that agreement, and prevails on the collector of the fees to pay over to him

the whole of what he then has in his hands. Held, that the collector having received one half of these fees to the use of the churchwardens, they are entitled to recover that moiety from the vicar, in an action for money had and received. *Littlewood v. Williams*, 1 Mars. 589; 6 Taunt. 277.

XII. ON THE DISCHARGE OF THIRD PERSONS FROM LIABILITY.

(a) *By a payment to the agent.*

A payment by one party to the other's agent, before the time appointed, and without the other's consent, is at the risk of the payer. *Parnther v. Gaitskell*, 13 East, 432.

PRINT.

I. RELATIVE TO THE COPYRIGHT IN.

(a) *Conditions of*, p. 811.

(b) *Abandonment of*, p. 811.

II. RELATIVE TO THE ASSIGNEE OF.

(a) *Suits by.*

(a 1) *Parties to*, p. 812.

(a 2) *Evidence in*, p. 812.

I. RELATIVE TO THE COPYRIGHT IN.

(a) *Conditions of.*

1. If the proprietor of a mezzotinto or other print, will entitle himself to the benefit of 8 Geo. II, c. 13, he must engrave both his name and the day of the first publishing thereof, on the plate, and stamp the same on the print. *Sayer v. Dacey*, 3 Wils. 60.

2. To rest an exclusive right, under stat. 17 Geo. III, c. 57, in the inventor of a print, it is necessary that as well his name as the date of the publication should appear. But, *query*, whether the name of the proprietor should not be altered as often as the property is changed? *Thompson v. Symonds*, 5 T. R. 41.

(b) *Abandonment of.*

The proprietor of a print does not lose his monopoly under stat. 17 Geo. III, c. 57, by destruction or alteration of the original plate. *Thompson v. Symonds*, 5 T. R. 41.

II. RELATIVE TO THE ASSIGNEE OF.

(a) *Suits by.*(a 1) *Parties to.*

Under stat. 17 Geo. III, c. 57, a print may be assigned, so that the assignee may sue in his own name for pirating it. *Thompson v. Symonds*, 5 T. R. 41.

(a 2) *Evidence in.*

In an action by the assignee of a print for pirating it, it is sufficient to produce an impression, without the plate. *Thompson v. Symonds*, 5 T. R. 41.

PRINTER.

I. RIGHTS OF.

(a) *To payment as the work advances*, p. 812.(b) *See LIEN.*

II. CONTRACTS BY, WITH PUBLISHER.

(a) *Express.*(a 1) *To insure*, p. 812.(b) *Implied.*(b 1) *To insure*, p. 812.

I. RIGHTS OF.

(a) *To payment as the work advances.*

By the custom of the trade a printer is not entitled to any part of his demand until the whole impression has been struck off and delivered. *Gillett v. Mawman*, 1 Taunt. 137.

II. CONTRACTS BY, WITH PUBLISHER.

(a) *Express.*(a 1) *To insure.*

Where a printer undertakes to complete a work in a given time, and to insure the bookseller's paper, the period of insurance is not limited to that time, since there is no implied agreement on the part of the bookseller to furnish the printer within that time with the means of completing it; but the contract continues until the work is either completed or abandoned. *Mawman v. Gillett*, 2 Taunt. 325, n.

(b) *Implied.*(b 1) *To insure.*

It is not the custom of the London trade for the printer to insure the pub-

lisher's paper. *Mawman v. Gillett*, 2 Taunt. 325, n.

PRISONER.

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- (a) *When requisite*, p. 817.

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I. COMMITTITUR OF.

- (a) *When entered, and filed, and consequences of omission.*

1. Rule as to the time of filing and entry of committiturs against prisoners, K. B. East, 41 *Gep. III*; 1 *East*, 410.

2. The committitur must be filed the same term as the marshal's acknowledgment. *Cunningham v. Cogan*, 10 *East*, 46.

3. If a committitur is not entered on record within two terms, the prisoner is entitled to his discharge. *Potterell v. Philby*, 3 *Burr*. 1841.

- (b) *Amendment of.*

If a judgment against two be affirmed with costs on error, brought by one alone, whereupon the other being a prisoner, is charged in execution for the amount of the original judgment, and the costs in error, (to which last he is not liable) the court will allow the committitur to be amended, since there is something to amend by, namely, the original judgment. *Laroche v. Wasbrough*, 2 *T. R.* 737.

- (c) *Of a second committitur for the same cause.*

A second committitur in execution for the same cause, before the first has been duly discharged, is irregular. A notice by the party that he has abandoned the first, is the proper mode of discharging it. *Topping v. Ryan*, 1 *T. R.* 227.

II. ON THE DETAINER OF, BY THIRD PERSONS.

(a) *Whether allowable when supersedeable.*

A prisoner cannot be detained in an action on a judgment upon which, though not ordered to be discharged, he was supersedeable from delay. *Pierson v. Goodwin*, 1 B. & P. 361.

(b) *Whether avoided by avoidance of original proceeding.*

Where a defendant held to bail on a judge's order is discharged on the ground of a material concealment in obtaining it, all detainers by third persons, founded thereon, stand good. *Davies v. Chippindale*, 2 B. & P. 282.

III. OF THE PRISONER'S ALLOWANCE.

(a) *Reduction of.*

The court have no discretionary power to reduce a prisoner's allowance below the 3s. 6d. mentioned in the st. 37 Geo. III, c. 85, s. 2. *Rex v. Davis*, 1 B. & P. 336.

(b) *Security for.*

(b 1) *Of describing the court therein.*

A promissory note to pay a prisoner his sixpences is valid, though it does not state the style of the court in which the action against him is brought. *Anon.* 3 Smith, 642.

(b 2) *In the case of joint plaintiffs.*

1. A note for groats is void, unless signed by all the plaintiffs in the particular suit; the prisoner therefore is entitled to his discharge, notwithstanding he has received payments under it. *Rex v. Wilkinson*, 7 T. R. 156.

2. A note for the payment of a prisoner's allowance, signed by one of several joint plaintiffs as on behalf and by authority of all, is sufficient. *Meux v. Humphry*, 8 T. R. 25. *Secus*, if not expressed to be signed on behalf of, or if not by authority of all. *Lepine v. Bayley*, Id. 325.

(c) *Irregularity in the payment, consequences of.*

If any part of a prisoner's allowance is paid to him in spurious or foreign coin, he is entitled to his discharge. *Agutter v. Wilson*, 7 Taunt. 7.

IV. OF SECURITIES GIVEN BY A PRISONER.

(a) *Who considered a prisoner in relation to the giving of securities.*

A defendant lodging within the rules of the Fleet, at the house of the officer who arrested him, and who was his security to the warden, was held to be so far a prisoner, that he could not execute a warrant of attorney to confess a judgment, without the presence of an attorney on his behalf. *Waraker v. Gascoyne*, 2 Blk. 1297.

(b) *On the presence of an attorney.*

(b 1) *When requisite or not, — general rules.*

1. The rule requiring an attorney to be present on behalf of a prisoner executing a warrant of attorney, applies to those cases only where he is in custody at the suit of the party for whom the warrant is given. *Charlton v. Fletcher*, 4 T. R. 433. *Holcombe v. Wade*, 3 Burr. 1792; *Smith v. Burlton*, 1 East, 241.

2. The rule of K. B. East, 15 Car. II, which requires that an attorney on the part of a prisoner should be present when a bond and warrant of attorney are executed by him, only relates to persons in custody upon mesne process. *Birch v. Sharland*, 1 T. R. 715; *Crompton v. Steward*, 7 T. R. 19; *Fell v. Ryley*, Cowp. 281.

3. The rule that an attorney must be present at the execution of a warrant to confess a judgment, holds, though others not in custody join therein as sureties. *Valentine v. Gulland*, 2 Taunt. 49.

(b 2) *When requisite or not, in particular instances.*

1. The court will not set aside a warrant of attorney, from its having been given by a defendant in custody, without an attorney on his behalf being present, if executed purposely to cheat the plaintiff. *Gillman v. Hill*, Cowp. 141.

2. If a defendant, on being arrested by a sheriff's officer, give a *cognovit* to the plaintiff, who was the attorney in the cause, without an attorney being present on his part, such *cognovit* is void, although the plaintiff swore that he did not know that the defendant was in custody, and although he was unattended by the officer. *Webb v. Aspinall*, 1 Moore, 428.

(b 3) *Who considered as.*

1. A warrant executed in the presence of one produced by the defendant as the attorney on his part, is valid, though, in fact, he is not an attorney. *Jeyes v. Booth*, 1 B. & P. 97.

2. The presence of an attorney, though a stranger to the defendant, and introduced by the plaintiff's attorney, who objected to wait until the defendant sent for his own, satisfies the rule. *Osborne v. Davis*, 4 Taunt. 797.

3. The presence of the plaintiff's attorney, though nominated by the defendant, is not sufficient to give validity to a warrant of attorney signed by him when in custody. *Hutson v. Hutson*, 7 T. R. 7.

4. An attorney must be present when a defendant in custody gives a *cognovit*. The presence of his clerk is not sufficient, though he approved the *cognovit*, and sent him with it. *Paul v. Cleaver*, 2 Taunt. 360.

(c) *Of the remedy in case of imposition.*

Though a prisoner be not strictly within the rule of K. B. 15 Car. II, relative to warrants to acknowledge judgment given by prisoner, the court will, nevertheless, relieve him from imposition. *Parkinson v. Cairnes*, 3 T. R. 616.

V. AS TO WHEN A PRISONER IS OR IS NOT SUPERSEDEABLE.

(a) *General rule.*(a 1) *In relation to the custody.*

A prisoner, in custody of the sheriff, shall be discharged on common bail for want of declaring in due time, the same as if in custody of the marshal. *Pullen v. White*, 3 Burr. 1448.

(b) *From delay,—general rule.*

1. In C. B. the defendant is not super-sedeable till the end of the term after that in which the process is returnable. 2 Blk. 1242.

2. There must be exceptions to the literal meaning of every rule, where the letter would work an injustice, or contradict the spirit of the rule: And, therefore, the court refused to discharge out of custody, for want of proceeding against a prisoner within two terms, where there was a mistake occasioned by two being of the same surname. — *v. Parkes*, Loft. 274.

(c) *From delay,—on surrender in discharge of bail.*

A defendant who surrenders himself in discharge of his bail, shall be discharged, for want of being charged in custody within two terms. *Russell v. Stewart*, 3 Burr. 1787.

(d) *From delay,—pending a treaty of compromise.*

While a treaty subsists between the plaintiff and the defendant, a prisoner, the plaintiff is not obliged to declare against him within two terms. *Walter v. Stewart*, 3 Wils. 455; 2 Blk. 918.

(e) *From delay,—pending error.*

A plaintiff may shew for cause against a *supersedeas* issuing, that the defendant has sued out a writ of error before the end of the two terms. *Garratt v. Mantell*, 2 Wils. 380.

(f) *From delay,—in not signing, docketting, or entering judgment.*

1. A defendant in custody is super-sedeable, if final judgment is not signed within three terms, inclusive, after declaration delivered. *Knight v. Parker*, 2 Blk. 769.

2. A prisoner in execution is not super-sedeable, on the ground that no judgment was docketted and entered up on the roll at the time of charging him. *Pariente v. Castle*, 2 B. & P. 163.

(g) *From delay,—in not charging in execution.*

1. A surrender in discharge of bail in vacation after verdict, is considered, with reference to the rule for charging in execution, as a surrender not of the preceding but subsequent term; therefore, the plaintiff has until the end of the term following the subsequent term for charging in execution. *Smith v. Jefferys*, 6 T. R. 777.

2. The rule of K. B. Hil. 26 Geo. III, directs that a prisoner shall be charged in execution within two terms next after trial had, or final judgment obtained, the term of the trial or judgment to be one. The words "final judgment," mean judgment without a trial; so that if a trial has been had, the two terms are reckoned from that of the trial, and not from that of the judgment. *Heatm v. Whittaker*, 4 East, 349.

3. Notwithstanding the allowance of a writ of error, a prisoner may be charged

in execution. *Fisher v. McNamara*, 1 B. & P. 292. See *infra*, (h), pl. 2.

4. Final judgment being obtained against a prisoner in Michaelmas term, the plaintiffs being then bankrupts, held that the assignees could not charge him in execution in the Hilary term succeeding, being prevented by defendant's plea to their *scire facias*. *Bibbins v. Mantell*, 2 Wils. 378.

(h) *From delay,—in the case of joint defendants.*

1. One of two prisoners sued jointly, who has suffered judgment by default is not supersedeable as for a noncompliance with the rule to proceed to trial or judgment within three terms, where the plaintiff, within that time, proceeded to trial against the other, and thereupon assessed damages against the former. *Wriglesworth v. Wright*, 13 East, 167.

2. If on a judgment in K. B. against two, one alone brings error, the writ nevertheless removes the record, so that no execution can go against the other. Hence, if he is a prisoner, he need not, for he cannot, be charged in execution, until the record is remitted. *Laroche v. Washough*, 2 T. R. 737. See *supra*, (g), pl. 3.

(i) *From the creditor suing out a commission of bankruptcy.*

A plaintiff's suing out a commission of bankrupt against a defendant in execution, is no ground at law for discharging him out of custody. *M'Master v. Kell*, 1 B. & P. 302.

(k) *From the death of the creditor without a representative.*

After the lapse of a reasonable time from the death of the plaintiff, and no probate or administration granted, the defendant in execution will be discharged on notice to the plaintiff's family, and no cause shewn. *Broughton v. Martin*, 1 B. & P. 176; *Parkinson v. Horlock*, 2 N. R. 240.

VI. ON THE SUPERSEDEAS OF A PRISONER.

(a) *Application for, when made.*

1. By rule of K. B. 2 Geo. I, unless the plaintiff proceed to trial or judgment against a prisoner within three terms, he is entitled to be discharged. He cannot apply until

the expiration of the third term. *Thomas v. Prichard*, 4 T. R. 664.

2. Where a prisoner is entitled to be superseded, he may apply for his discharge at any time. Where he seeks to be discharged upon the ground of an irregularity in the proceedings against him, he must, like every other defendant, apply promptly. *Robertson v. Douglas*, 1 T. R. 191.

3. The rule that a prisoner who is once supersedeable is always so, means, so long as he remains in the same custody, and under the same process. If, therefore, a prisoner on mesne process is supersedeable for any irregularity, and having an opportunity neglects to insist upon it, until after he has been charged in execution, he waives his right. *Rose v. Christfield*, 1 T. R. 591.

4. A prisoner supersedeable from irregularity of proceeding, must object in the first instance; hence, if it consist in the not having filed a bill in due time, he waives the objection by afterwards pleading. *Pearson v. Rawlings*, 1 East, 77.

(b) *Subsequent proceedings to, form of.*

After a prisoner has obtained a *superseas*, all subsequent proceedings against him must be as against persons at large. Though he waives an irregularity in this particular by delay. *Gehagan v. Harper*, 1 H. B. 251.

(c) *Legal effect of,—whether a discharge of the debt.*

A *superseas* after judgment of a defendant in custody, does not discharge the debt; and therefore cannot be pleaded to an action of debt on the judgment. *Topping v. Ryan*, 1 T. R. 273.

VII. ON THE DISCHARGE OF, UNDER STAT. 48 GEO. III, C. 123.

(a) *Statute, whether applicable to criminal cases.*

The statute 48 Geo. III, c. 123, which entitles a defendant to be discharged out of custody, after having been twelve months in execution for damages not exceeding 20*l.* applies to civil not criminal proceedings. Hence, where defendant coming up to receive judgment on an indictment for an assault, it was agreed that the parties should go before the master, who thereupon awarded 13*l.* 13*s.* to the prosecutor, for damages, and 60*l.* 17*s.* 7*d.* for his costs. Held, that the defendant

was not entitled to be discharged under this statute. *Rex v. Dunne*, 2 M. & S. 201.

VIII. ON THE BILL AGAINST A PRISONER.

(a) *When requisite.*

In actions by bill in K. B. the delivery of a declaration to a prisoner is a nullity, unless a bill has been previously filed; nor is the objection waived by his allowing the plaintiff to sign judgment for want of a plea. *Nowell v. Bingham*, 4 East, 16.

IX. PLEADINGS AND PRACTICE RELATIVE TO.

(a) *Relative to the declaration.*

(a 1) *The court in which to declare on a removal, defined.*

If a prisoner is removed from the K. B. prison to the Fleet, before declaration delivered, the plaintiff may either retain the cause in K. B. and bring it back by *habeas corpus*, for the purpose of declaring against the defendant, or declare against him in the Fleet. *Sherson v. Hughes*, 5 T. R. 35.

(a 2) *The time for declaring, how computed.*

The two terms limited for declaring against a prisoner are reckoned, not from the time of arrest, but from the return of the writ. *Richardson v. Richardson*, 6 T. R. 547.

(a 3) *Whether to be delivered or filed.*

By the statute 4 & 5 W. & M. c. 27, where a defendant is in actual custody, the declaration in the suit in which he has been arrested, must be delivered, either to himself personally, or to the gaoler. The statute not having provided for the case, where the plaintiff, at whose suit he is in custody, has served him with process in a subsequent action for a different cause, the declaration in that action may be filed. *Robertson v. Douglas*, 1 T. R. 191.

(a 4) *On the delivery of,—general rule.*

1. A copy of the declaration must be delivered to the prisoner, as well as the declaration entered, before the expiration of the term next after the process is returnable. *Blyth v. Harrison*, 1 B. & P. 535.

2. A declaration must be served on a prisoner, or left with the turnkey, though

he has appeared by attorney. *Clavey v. Watts*, 2 Blk. 786.

(a 5) *On the delivery of,—in vacation time.*

A declaration may be delivered against a prisoner in vacation, by the same plaintiff who had arrested him. *Heron v. Edwards*, 8 T. R. 643.

(a 6) *Mode of describing a committitur in K. B.*

A committitur to the custody of the marshal of the K. B. prison, on a *habeas corpus*, is not a matter of record; wherefore it need not be averred in pleading with a *prout patet per recordum*; and if it be, the allegation may either be rejected as surplusage, or is sufficiently proved by the production of the writ with the committitur annexed, by the clerk of the papers of the K. B. prison, with whom, as servant of the marshal, such papers are usually deposited. *Wigley v. Jones*, 5 East, 440; 1 Smith, 457. Vide supra, 602, IV, (a); *Turner v. Eyles*, 3 B. & P. 456.

(b) *Relative to the plea.*

(b 1) *Whether to plead to the declaration delivered, or to that filed.*

If a prisoner pleads to a declaration delivered to him, he needs not plead to the same declaration afterwards filed. *Traut v. Paravicini*, 4 Taunt. 554.

(b 2) *Filing of, how computed.*

A plea filed by a prisoner, is only well filed from the time of notice given. *Thomas v. Prichard*, 4 T. R. 664.

(b 3) *Notice of.*

A plea filed by a prisoner as of a term antecedent to that in which he is bound to plead, is a nullity, unless he gives notice to the plaintiff. *Parkinson v. Thompson*, 8 T. R. 596.

(b 4) *Demand of.*

1. In the K. B., if a prisoner is in custody of the marshal, there must be a demand of a plea; *secus*, where he is in custody of the sheriff. In the former case he is in court, in the latter not. *Rose v. Christfield*, 1 T. R. 591.

2. A prisoner who is prevented justifying bail, by the plaintiff's desiring to inquire into their sufficiency, is, from the time of his notice of justification, entitled

to the demand of a plea. *Davies v. Chippendale*, 2 B. & P. 367.

(c) *Relative to the marshal's acknowledgment.*

(c 1) *As of what term.*

The marshal's acknowledgment of the defendant's being in his custody, must be of the same term in which he is charged in execution; otherwise he is entitled to his discharge. *Fisher v. Stanhope*, 1 T. R. 464.

X. OF EVIDENCE RELATIVE TO.

(a) *The day-book of the prison, evidence of what.*

The day-book of a public prison is inadmissible to prove the cause of a prisoner's commitment. *Salte v. Thomas*, 3 B. & P. 188.

XI. WHEN CONSIDERED IN CRIMINAL, WHEN IN CIVIL CUSTODY.

An attachment for non-payment of costs is considered a civil, not a criminal process; therefore a party in custody under it, may be detained, or charged on civil process in another action, without leave of the court, or a judge's order. *Bonafous v. Schoole*, 4 T. R. 316.

XII. OF CIVIL PROCEEDINGS AGAINST A PRISONER IN CRIMINAL CUSTODY.

A party in custody on criminal process, cannot be charged with a civil action in the C. B. *Walsh v. Davies*, 2 N. R. 245.

PRIVY COUNCIL.

LAW COMMITTEE OF:

(a) *Privilege of, to take the opinion of a court of law.*

The law committee of the privy council cannot send a case to a court of law for their opinion. *Dougl.* 344, n.

PRIZE AND PRIZE MONEY.

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VIII. OF THE REMEDY FOR INJURIES RESULTING FROM A CAPTURE AS,

I. OF THE TITLE TO.

(a) *When it vests.*

No right vests under the prize acts in the captor, until ultimate adjudication by the prize courts. *Horne v. Earl Camden*, 2 H. B. 533.

(b) *How determined.*

The title to prize-money must be decided by the king's proclamation for its distribution. *Sutton v. Johnstone*, 1 T. R. 508.

(c) *On a joint capture by privateers.*

Where there is a joint capture by several privateers, they are to share in proportion to the number of men in each. *Roberts v. Hartley*, *Dougl.* 311.

(d) *Of a second captain.*

A second captain appointed by the Admiralty, on board, and commanding as such at the time of capture, is entitled to share as a captain, under the prize proclamation of 25 Nov. 1795. *Waterhouse v. King*, 2 East, 507.

(e) *Of an officer not belonging to the ship.*

A captain of marines who happens to be on board a man-of-war, when she takes a prize, but does not belong to her complement, shares only as a passenger. *Wenays v. Linzee*, Dougl. 324.

II. RELATIVE TO FLAG-OFFICERS.

(a) *Who are considered such.*

1. Under the prize proclamation of 1797, that officer is entitled to the flag-eighth, who was the *effective* commander on the station at the time of capture; and not the *nominal* one, who is returning home, leaving the ships behind under his command; and this, whether he succeeded to the command by seniority, or under an express commission, and though the capture was made by certain ships, previous to the time from which alone the officer returning home had directed that his successor should consider them as under his command, (the former, in this case, had passed the limits of his station when the capture was made), since he had no right so to limit his authority. *Lord Nelson v. Tucker*, 4 East, 238, reversing the judgment in 3 B. & P. 257; *Lord Keith v. Pringle*, 4 East, 261.

2. Where a captain under the command of a flag-officer, had quitted his station in disobedience of orders, but with a view to the service of his country, and for which, therefore, he received the approbation of the Admiralty, and thereupon took a prize; held, that the flag-officer was not entitled to the flag-eighth under the proclamation of 1795, as he was neither actually on board nor even impliedly directing or assisting in the capture. *Harvey v. Cooke*, 2 Smith, 341; 6 East, 220.

3. Unless by the special terms of his commission, a ship detached by one commanding officer within the limits of another's command, ceases, whilst within them, to be under the command of the former, who therefore is not entitled to the flag-eighth under the proclamation of 1797, of a capture made therein. *Holmes v. Rainier*, 8 East, 502.

4. Even admitting that the commander upon one station may annex to his command, a cruiser put by the Admiralty under the command of an admiral upon another station; still he cannot entitle himself to share in the prizes she may take whilst cruising under the orders he

may have given to her, unless taken during such time as she cruizes within the limits of his station. *Lady Gardner v. Lyné*, 13 East, 574.

5. A. is an officer commanding on one station; B. is an officer commanding on another. A. takes a vessel, under authority, from B's station, over which, having performed the destined service, A. has no farther controul. Notwithstanding this, however, he sends the vessel to cruise on a particular service, and as it happens, within the limits of B's station, to which station, too, the ship ought to have returned. Whilst there, she makes a capture. Held, that B, and not A, was entitled to the flag-eighth. A, was not entitled, for she was not on his station when she gave chase, nor under his orders: The commanding officer of the station therefore was, and that was B. *Drury v. Lady Gardner*, 2 M. & S. 150.

6. An expedition is sent against Holland under the command of A, with instructions that if the co-operation of B, an admiral commanding on another station, might become necessary, he, A, was upon joining B, to put himself and his fleet under B's orders. The co-operation of B. is deemed necessary, and A. joins and puts himself under B's orders. B. sends proposals to the enemy for surrendering their fleet, but before they agree to surrender, he sets sail for England with his squadron; and when they agree is out of sight and hearing. Held, that A, and not B, was entitled to share as commander-in-chief. *Lord Viscount Duncan v. Mitchell*, 4 M. & S. 105.

7. Held, that under the prize proclamation of 25th June 1779, a flag-officer was not entitled to share in a prize taken by a vessel detached by him after he had accepted another command, though no successor was appointed. *Johnstone v. Margetson*, 1 H. B. 261.

8. A commodore, unless authorized by his commission, cannot appoint a captain under him. And such appointment, though afterwards ratified by the Admiralty or the crown, will not entitle him to share as a flag-officer, except from the time of ratification. *Donelly v. Popham*, 1 Tatmt. 1.

III. RELATIVE TO COMMANDERS.

(a) *Who are considered as.*

1. The person who stands on the ship's

books as captain of the ship, and who is actually on board at the time of capture, is entitled to the captain's share of prize-money, though under arrest, and though another officer was on board who had been sent to take the command. *Lumley v. Sutton*, 8 T. R. 224.

2. The mate of a revenue cutter, acting as commander under a temporary appointment made by the comptroller and collector of the customs at the port to which she belongs, was held entitled to share as commander under the warrant of 26th Nov. 1803, without deducting the share of a deputed mariner, who at the time of the capture was on board acting as mate, by like authority. And this, notwithstanding the former commander whose commission as such had before been withdrawn and cancelled by order of the commissioners, was afterwards restored and a new commission granted to him, bearing the same date as his former commission, which was before the prize taken. *Pill v. Taylor*, 11 East, 414.

IV. ON THE ASSIGNMENT OF.

(a) *Its form.*

The right to prize-money and wages of seamen and marines, can only be assigned in the form prescribed by st. 26 Geo. III. c. 63, and the acts therein mentioned. *Turtle v. Hartwell*, 6 T. R. 426.

V. RELATIVE TO THE PROCEEDS OF.

(a) *Of the title to interest made thereon.*

Interest made with the proceeds of a prize, are considered as part of the proceeds; therefore, the court of appeal, on reversal of the condemnation, may direct it to be paid by whoever may have received it as such; therefore, by the prize agent. *Willis v. The Commissioners of Appeals in Prize Causes*, 5 East, 22; 1 Smith, 339.

VI. CONSTRUCTION OF PROCLAMATIONS RELATIVE TO.

(a) *Of 1797.*

The commencement of a commander-in-chief's departure from the local station of his command, for the purpose of returning home, leaving his fleet behind, i. e. leaving it for all effective purposes under the controul of another commander competent, under the terms of the prize proclamation of 1797, to command in his

PROCESS.

stead, is a "returning home" within the meaning of that proclamation. *Lord Nelson v. Tucker*, 4 East, 238; *Lord Keith v. Pringle*, 1d. 261.

(b) *Of 1800.*

The warrant of 26th June 1800, does not authorize the referring of the question which of two officers was commander-in-chief. On such a reference, therefore, the decision of the referees was held not to be conclusive, being unauthorized. *Lord Viscount Duncan v. Mitchell*, 4 M. & S. 105.

VII. STATUTES RELATIVE TO.

(a) 33 Geo. III, c. 32.

By st. 33 Geo. III, c. 32, the parties shall not be liable, in case of the reversal of a sentence of condemnation, beyond the net value of the proceeds at the time of the sale of the prize. The meaning is, that the captors shall not be charged with the value of the prize beyond the amount of what it then produced. Therefore, they are chargeable with any interest made with those proceeds. *Willis v. The Commissioners of Appeals in Prize Causes*, 5 East, 22; 1 Smith, 339.

VIII. OF THE REMEDY FOR INJURIES RESULTING FROM A CAPTURE AS.

1. Where a ship is *bona fide* seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she be released without any suit being instituted against her; his remedy, if any, being in the court of Admiralty. *Faith v. Pearson*, 2 Mars. 133; 6 Taunt. 4396.

2. Trespass will not lie for an imprisonment which was merely in consequence of the capture of a ship as prize, although the ship shall have been acquitted. *Le Caux v. Eden*, Dougl. 594.

3. No action lies for goods taken on shore as prize by the joint operation of a fleet and army. *Lindo v. Rodney*, Dougl. 613, n.

PROCESS.

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III. OF FINAL PROCESS.

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- (b) *On the mode of executing,* supra, I. (d).

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I. OF PROCESS IN GENERAL.

- (a) *Form of.*

- (a1) *Whether general or special.*

A general warrant is illegal. *Money v. Leach*, 3 Burr. 1742; 1 Blk. 555; *Wilkes v. Wood*, Loft. 1.

- (a2) *Style of the court, how far an essential.*

Style of the court of King's Bench mistaken in the plaint for that of the Common Pleas, vitiates the judgment. *Anon. Loft.* 184.

- (b) *To whom directed.*

- (b1) *Where the sheriff is plaintiff.*

Where a sheriff is plaintiff, a *latitat* (c. gr.) directed to himself, is irregular. *Weston v. Coulson*, 1 Blk. 506.

- (b2) *In Southwark.*

Process from the superior courts to be executed in Southwark, must be directed, not to the bailiff of that borough, but to the sheriff of Surry. *Bowring v. Pritchard*, 14 East, 289.

- (b3) *In Durham.*

Though it is informal to address process to the sheriff of Durham direct, instead of through the chamberlain, the writ is not void; therefore a bail bond taken thereon is good. *Jackson v. Hunter*, 6 T. R. 71.

- (b4) *In Cambridgeshire.*

The officers appointed by law to execute the civil process of the superior tribunals, and who alone are officers of the court, are the sheriff of the county, and the lord or bailiff of a franchise or peculiar jurisdiction; therefore, such process directed to the bailiff of the Isle of Ely, instead of the sheriff of Cambridgeshire, is a nullity, and the bailiff a trespasser for executing it. *Grant v. Bagge*, 3 East, 128.

- (c) *Where executed.*

- (c1) *On the premises of a third person.*

For the purposes of executing process, the house of one man may be accounted that of another, where he has permitted him to use it as his own by residence therein. *Sheers v. Brooks*, 2 H. B. 120.

- (c2) *In the king's palace.*

1. Process out of the Palace Court at Westminster may lawfully be executed within the palace, though the king is actually resident therein, and no leave has been obtained from the Board of Green Cloth. *Rex v. Stobbs*, 3 T. R. 735.

2. Civil process cannot be executed in any of the king's palaces which are kept constantly prepared for his majesty's re-

ception; though he may not reside therein. *Winter v. Miles*, 10 East, 578.

(d) *Mode of executing.*

(d 1) *By breach of the inner door.*

An inner door may be broken open in the execution of civil process. *Lee v. Gansel*, Cowp. 1; Loft. 375.

(d 2) *By breach of the outer door.*

1. Outer door may be broken in executing process for a contempt. *Burdett v. Abbot*, 4 Taunt. 401.

2. If a bailiff has made a legal arrest, and the prisoner escapes, he may justify breaking open the door of the house upon fresh suit to retake him. *Lee v. Gansell*, Loft. 382, 390.

(d 3) *By calling others in aid.*

In the execution as well of civil as criminal process, an officer may call in the assistance of others, who then may justify as the officer may do. *Grant v. Bagge*, 3 East, 128.

(d 4) *By entering under a false pretence.*

Though a bailiff gets in under a false pretence, yet he who resists him does it at his peril. *Rex v. Backhouse*, Loft. 62; *infra*, (e 1).

(e) *Justification under.*

(e 1) *In relation to the avowed purpose.*

A party may justify under legal process, or as a distress, though at the time he assigned a different cause for his interference. *Crowther v. Ramsbottom*, 7 T. R. 654; 1 East, 142; *supra*, (d 4).

(e 2) *The process of an inferior court.*

In justifying under authority of an inferior court, it is not sufficient to allege generally, that they had jurisdiction over the subject matter; it must be stated what the jurisdiction was, and then such facts alleged, as may enable the superior court to judge whether the court below had jurisdiction of the particular cause or not. *Collett v. Lord Keith*, 2 East, 274.

(e 3) *The process of a foreign court.*

1. A justification under the process of a foreign court, must state all facts, which, if they did not exist, the defendant would not be justified; and it seems those facts must be stated with that degree of certainty, that if issue be taken on them, it may be known with precision what the

exact point in dispute is. *Collett v. Lord Keith*, 2 East, 280.

2. An averment in a plea of justification under the process of a foreign court, that the defendant was ordered, &c. is not a sufficient averment that he acted as officer of the court. *Collett v. Lord Keith*, 2 East, 280.

(f) *Indictment for obstructing the execution of.*

(f 1) *Of shewing that the officer had authority to execute it.*

1. In an indictment for obstructing an officer in the execution of process, it must distinctly appear that he was authorized to execute it; and therefore, that he was an officer of the court; which does not, from an averment that the judges of a court of record for the town and county of P, by their writ issued out of said court, directed to A. & B, serjeants at mace of the said town and county, did command them, &c. *Rex v. Osmer*, 5 East, 304; 1 Smith, 555.

2. Where a general verdict for the crown is given on an indictment for assaulting and obstructing an officer in the execution of process, which, it appears, he was not authorized to execute, it will be intended, that the assault was for preventing what would have been an unlawful proceeding, and the judgment therefore will be arrested in toto. *Rex v. Osmer*, 5 East, 304; 1 Smith, 555.

II. OF MESNE PROCESS.

(a) *When issuable.*

(a 1) *Previous to the cause of action.*

1. As well a bailable as a common writ may, in suits by bill, be sued out before the cause of action accrued. *Foster v. Bonner*, Cowp. 454; *Best v. Wilding*, 7 T. R. 4. Though it seems an action lies for a malicious arrest. *Swan-cott v. Westgarth*, 4 East, 74.

2. As a *latitat*, so a *capias*, may be sued out before the cause of action. *Davis v. Owen*, 1 B. & P. 342; *Lee v. Clarke*, 2 East, 333; *semble, contra*.

(b) *On the joinder of parties in.*

In bailable actions, several defendants for distinct and separate demands, cannot be joined in the same writ or in the same affidavit. *Secus*, in actions not bailable. *Holland v. Johnson*, 4 T. R. 695; *Holland*

v. *Richards*, 697, n. (b); *Yardley v. Burgess*, Id. n.

(c) *On the teste of.*

1. If a *latitat* bears teste out of term, it is void. *Hart v. Weston*, 5 Burr. 2586.
2. Process sued out in term time, may be tested as of the preceding term. *Young v. Wilson*, 5 Taunt. 664.

(d) *On the additon of the filazer's name to a capias.*

The filazer's name need not be added to a common *capias*. *Frost v. Eyles*, 1 H. B. 120.

(e) *When made returnable.*

(e 1) *A bill of Middlesex.*

A bill of Middlesex may be returnable the day it is sued out. *Orlade v. Davidson*, 4 T. R. 610.

(e 2) *A testatum capias.*

Proceedings will be set aside where a *testatum capias* is returnable on a day certain. *Inman v. Huish*, 2 N. R. 133.

(f) *On the consequential process.*

(f 1) *A distringas,—of the service to warrant its issuing.*

1. Service of *venire facias ad resp.* by leaving it with a clerk of the defendants, at their counting-house, not sufficient to obtain *distringas*, though after several ineffectual calls made for the purpose of personal service. *M'Nabb v. Ingham*, 2 Price, 9.

2. Service of *venire facias ad resp.* served on defendant's servant at his dwelling-house during his absence abroad, not sufficient to warrant a *distringas*; nor will the court grant a rule to shew cause why such service should not be sufficient. *Caulin v. Lawley*, bart. 2 Price, 12.

3. Where the defendant is gone abroad, the service of the sheriff's summons granted on a writ of *venire facias ad respondendum*, at his last place of abode, is regular. *West v. Dalton*, Forrest. 29.

4. The court will not grant a *distringas* against a defendant who has not been served with process, other than by delivery of it to a person at whose house he had recently resided, unless it appear that he then lived there. *Horton v. Peake*, 1 Price, 309.

5. Service of *venire facias* at the dwelling-house, on defendant's wife, is good,

and the court will thereupon grant a *distringas*. *Hall v. Franklin*, 2 Price, 4.

(f 2) *A distringas,—whether issuable where the defendant is abroad.*

1. The service of a summons and execution of a *distringas* at the defendant's house who had gone abroad, leaving another in possession of it, is regular. *Staines v. Johannot*, 1 B. & P. 200.

2. A *distringas* against a defendant abroad, for a demand contracted by him during his absence, is regular. *Gurney v. Hardenberg*, 1 Taunt. 487.

3. The court will not grant a *distringas* to compel an appearance, on the ground that the defendant is out of the kingdom. *Jordan v. Bell*, 1 Mars. 292.

4. The affidavit for a *distringas* against a defendant abroad, must state that he is absent, in order to avoid process. *Jordan v. Pells*; *Renshaw v. Leame*; 5 Taunt. 703.

(f 3) *A distringas,—of a testatum writ.*

In suits against privileged persons, a *testatum distringas* issued into a different county to that in which the action is brought, and into which the original summons and *distringas* have issued, is regular. *Bloxham v. Surtees*, 4 East, 162.

(f 4) *A distringas,—of the amount of the levy thereon.*

1. Under a *distringas* to compel appearance, forty shillings only can be levied the first time. *Bloxam v. Surtees*, 4 East, 162.

2. Rule as to the increasing and sale of issues on writs of *distringas*. C. B. Trin. 38 Geo. III, 1 B. & P. 312.

(f 5) *A distringas,—of returning the issues thereon.*

Where a defendant stands out several *distringas*, the terms on which the issues will be returned, are in the discretion of the court. *Cazalet v. Dubois*, 1 B. & P. 81.

(f 6) *A distringas,—in relation to 10 Geo. III, c. 50.*

1. The costs of issuing writs of *distringas* under 10 Geo. III, c. 50, are to be paid before appearance, though no issues be levied. *Martin v. Townsend*, 5 Burr. 2725.

2. Statute 10 Geo. III, c. 50, extends to all writs of *distringas*, as well those issued against members of parliament as

others. *Raban v. Plaistowe*, 5 Burr. 2726.

(f 7) *A distringas*,—in relation to 51 Geo. III, c. 124.

1. The stat. 51 Geo. III, c. 124, s. 2. does not extend to counties palatine. *Quære*, whether it extends to the exchequer? *Moore v. Taylor*, 5 Taunt. 69.

2. Where a defendant is abroad, a plaintiff may still (since 51 Geo. III, c. 124,) issue a *distringas*, on service of the *venire facias*, for the purpose of compelling his appearance thereby, as he might have done before the act; but not for the purpose of enabling the plaintiff to enter an appearance for him, in order to proceed to final judgment, as if defendant had himself appeared. *Nicholson v. Bownass*, 3 Price, 263; *Dwerryhouse v. Graham*, Id. 266, n.

(f 8) *An attachment*,—whether void when excessive.

An excessive attachment is not therefore void. *Moore v. Taylor*, 5 Taunt. 69.

(g) *Where executed*.

(g 1) *In the case of a bill of Middlesex*.

A bill of Middlesex cannot be served out of the county of Middlesex. *Borman v. Bellamy*, 1 T. R. 187; *Devenege v. Dalby*, Dougl. 384.

(g 2) *In the case of a latitat*.

A writ, a *latitat* for instance, cannot be served in any other county, but that of the sheriff to whom it is directed; nor can any other sheriff but the one to whom it is directed, execute it. The sheriff has no jurisdiction out of his county. *Chase v. Joyce*, 4 M. & S. 412, accord.; *Borman v. Bellamy*, 1 T. R. 187; *Kelly v. Shaw*, 6 T. R. 74; *contra*.

(g 3) *In the case of a capias*.

By the practice of the C. B. no *capias* can be served out of the county into which it has been issued, *Willis v. Pendrill*, 2 N. R. 167. Even though the same officer should issue the writs, both into that county and into the county and jurisdiction in which the writ is actually served; as in the case of the county of Kent and the Cinque Ports. *Williams v. Gregg*, 2 Marshall, 550; 7 Taunt. 233.

(g 4) *In the case of process directed to the sheriff of Northumberland*.

Process directed to the sheriff of Northumberland, may be served in Newcastle-upon-Tyne. *Busby v. Fearon*, 8 T. R. 235.

(h) *Mode of executing*.

(h 1) *By breach of an inner door*.

An inner door may be broken open in executing process at the suit of an individual after demand, and neglect to open; and *semble*, though it turn out that the property or person is not within. *Ratcliffe v. Burton*, 3 B. & P. 223.

(h 2) *Right to exact surety-money*.

An officer who enters a house to attach goods under a *quare clausum fregit*, is not justified remaining therein, until the party pays him surety-money. *Moore v. Beaumont*, 6 T. R. 137.

(i) *On the service of*.

(i 1) *In a letter*.

Delivery of process, sealed up in a letter, is no service but from the time when the party to whom it is addressed happens to open it. *Arrowsmith v. Ingle*, 3 Taunt. 234.

(i 2) *By affixing the declaration in the office*.

An exception to the rule of C. B. for the service of process, can only be made by leave of the court; such as, that affixing the declaration in the office may be sufficient service. *Weller v. Robinson*, 1 Taunt. 433.

(i 3) *Time of Service*.

See PRACTICE.

(k) *On the copy of process*.

(k 1) *Variance in, the consequence*.

A variance, in the body of the copy of process, from the writ itself, is fatal, and subversive of the process and subsequent proceedings. *Morris v. Herbert*, 1 Price, 245.

(l) *On the notice to appear*.

(l 1) *When requisite or not*.

1. An English notice must invariably be subjoined, under stat. 12 Geo. I, c. 29, to serviceable process, though the demand is under 10*l*. *Lumley v. Fitz*, 7 T. R. 337.

2. Rule as to the subjoining notices to writs of summons and *distringas*, in actions by original *quare cl. fr.* C. B. Hil. 48 Geo. III; 1 Taunt. 204; 49 Geo. III, 1 Taunt. 505.

(12) *Want of, or irregularity in, the consequences.*

Any irregularity in, or want of the English notice, in the case of serviceable process, is no ground of objection to the writ, but only to the copy. *Lloyd v. Maurice*, 9 East, 528; *Grojan v. Lee*, 5 Taunt. 651.

(13) *Form of.*

1. The notice subjoined to a common *capias*, must be for appearance on the return day, not the *quarto die post*. *Rushton v. Chapman*, 2 B. & P. 340; overruling *Sumner v. Brady*, 1 H. B. 630.

2. The English notice subjoined to serviceable process, must express the day of appearance in words, not figures. *Pinero v. Hudson*, 1 M. & S. 119.

3. If the year only, in the notice subjoined on the service of process, is in figures, the service is regular. *Butler v. Cohen*, 4 M. & S. 335.

4. In the notice to appear, at the foot of the process, it is not necessary that the year should be stated in words at length. *Kennington v. Anderson*, 1 Marshall, 577, overruling *Rogan v. Lee*, 1 Mars. 272; 5 Taunt. 651; *Williams v. Jay*, K. B. decision, quoted in 5 Taunt. 652, n. and abandoned by the judges of K. B. on conference with those of C. B.

5. The year, in common process, need not be expressed in words at length. *Eyre v. Walsh*, 6 Taunt. 333.

6. Though the notice subjoined to serviceable process, require the defendant's appearance in a past year, it is good, since this cannot mislead. *Steel v. Campbell*, 1 Taunt. 420.

7. Summons and notice to appear at the return, being from Easter day in one month, is bad. *Ingle v. Trotter*, 4 Taunt. 751.

8. If the day on which a defendant is called on to appear, be omitted in the notice attached to mesne process, the court will set aside the writ, and all subsequent proceedings, notwithstanding the defendant has suffered a whole term to elapse without giving notice to the plaintiff, and does not apply to the court till after the

execution of a writ of inquiry. *Wickham v. Mealing*, 2 Price, 9.

9. The defendant must be named in the notice subjoined to serviceable process. *Worgman v. Blank*, 1 H. B. 100.

(m) *Day of appearance, how computed:*

The *quarto die post*, or day of appearance, is reckoned inclusive of the return day, though that fall on a Sunday. *Fano v. Coker*, 1 H. B. 9.

(n) *Irregularities in, or in the execution or service of,—mode of objecting to, and how waived.*

1. By taking the declaration out of the office, all irregularities in the process are waived. *Whale v. Fuller*, 1 H. B. 222.

2. The proper stage for objecting to irregularities in the process, is before appearance. *For v. Money*, 1 B. & P. 250.

3. A motion to set aside proceedings for irregularity, should be made as soon as the plaintiff, by taking a new step in the cause, shews that he means to proceed; therefore, when the defendant has been served with notice of declaration, and interlocutory judgment having been signed, with notice of executing a writ of enquiry, he is too late to take advantage of a defect in the process. *Fletcher v. Wells*, 1 Marshall, 550; 6 Taunt. 191.

4. The omission in process of the day of appearance, is an informality that may be waived by laches; at least where it appears that the defendant knew what was to be done. *Harris v. Mullet*, 1 Taunt. 59.

5. A defendant may move to set aside the service of a writ for irregularity at any time before a new step is taken in the cause. *Dand v. Barnes*, 1 Mars. 403; 6 Taunt. 5.

6. If a defendant be irregularly served with process, he may apply to set aside the proceedings, although the plaintiff may have entered an appearance for him and served him with a notice of declaration, and given him a rule to plead. *Ledwicke v. Prangnell*, 1 Moore, 299.

7. Where a *capias* per continuance is tested on the same day as the original *capias*, a new original *capias* may be taken out to warrant it. *Davis v. Owen*, 1 B. & P. 342.

8. A bill of Middlesex will not be set aside, because it requires the defendant to

answer in a plea of debt instead of trespass. *Barber v. Lloyd*, 2 T. R. 512.

9. The court (though they will set the proceedings aside) will not quash a writ on the ground of its having been served in a wrong county. *Watson v. Stedman*, 1 Mars. 9.

10. A waiver of an irregularity in process, by appearance, does not relate back so as to bring the defendant into contempt for not appearing in time. *Robinson v. Nash*, 1 Anst. 76.

(o) *How affected by irregularities in the affidavit to hold to bail.*

The *actum* part of the writ will not be struck out because the affidavit to hold to bail is defective. *Stinton v. Hughes*, 6 T. R. 13.

(p) *Justification under.*

(p 1) *Averment of previous facts and proceedings.*

As well bailable as serviceable process is valid, though the plaintiff has no cause of action. Therefore, in justifying under process, a cause of action need not be averred. *Belk v. Broadbent*, 3 T. R. 183.

(p 2) *Averment of its having issued in vacation.*

A *latitat* may be averred to have been sued out in vacation time. *Hart v. Weston*, 2 Blk. 683; 5 Burr. 2586.

(p 3) *Where the premises of a third person have been entered.*

In a plea of justification by the sheriff to an action for breaking the plaintiff's house, and breaking open the inner doors, it is not sufficient to allege that he entered under a *capias* against one A. B., the outer door being open, and that the rooms in the house being fastened, and having reasonable suspicion that A. B. was therein, the defendant broke open the same; without averring that A. B. was actually in the house, or that there was any previous demand of admittance; the sheriff being justified or not in entering the house of a stranger, by the event. *Johnson v. Leigh*, 1 Mars. 565; 6 Taunt. 246.

(p 4) *Of averring a return.*

1. A justification by the party or principal officer under *mesne* process, must

shew that it was returned; *secus*, under final process. *Rowland v. Vezale*, Cowp. 20.

2. A subordinate officer justifying under process, need not aver a return. *Moore v. Taylor*, 5 Taunt. 69.

3. A justification under a warrant of attachment, under a *justicies*, need not aver a return of the warrant. *Moore v. Taylor*, 5 Taunt. 69.

(p 5) *Under the process of an inferior court.*

A plea, unless by an officer, justifying under *mesne* process of an inferior court, must aver that the cause arose within the jurisdiction. *Evans v. Munkley*, 4 Taunt. 48.

(q) *Of successive writs.*

(q 1) *Legality of a quo minus, after common process for the same cause.*

The plaintiff may sue out a *quo minus* after having sued out common process for the same cause, and the court will not order the bail bond in the second process to be delivered up to be cancelled, because there was only one warrant for both processes. *Lee v. Long*, Wightw. 72.

(r) *Of the process of detainer.*

(r 1) *Whether may be lodged against a voluntary resiant within a prison.*

A detainer may be lodged against one within the walls of a prison, on what account soever he is there. *Wilkinson v. Jacques*, 3 T. R. 392.

(s) *Of the process on a justicies.*

The first process on a *justicies* is attachment. *Moore v. Taylor*, 5 Taunt. 69.

III. OF FINAL PROCESS.

(a) *On the precedence of.*

(a 1) *Whether waived by delay.*

Even admitting that a sequestration out of chancery to compel appearance, binds the defendant's property from the time of awarding it, in the same manner that a *fi. fa.* at common law, bound from the teste; yet it loses its title to precedence from not being enforced without unnecessary delay, so as to let in a subsequent execution, and render the sheriff (at least where he has not notice of the sequestration) answerable for a return of *nulla bona* thereto. *Payne v. Drew*, 4 East, 523; 1 Smith, 170.

(b) *On the mode of executing.*

(b 1) *By breach of an inner door.*

A sheriff may break the inner doors of a house to take under a *fi. fa.* without demand to have them opened for him. *Hutchison Birch*, 4 Taunt. 619.

(c) *Justification under.*

(c 1) *Averment of previous proceedings.*

On a justification by a sheriff, or his officer, under a *fi. fa.* when sued by a third person, the judgment must be proved. *Secus*, when sued by the original defendant. *Martyn v. Podger*, 5 Burr. 2631; 2 Blk. 701.

(c 2) *The seizure of a term.*

In justifying the seizure of a term under a *fi. fa.* it need not be stated what particular interest the party had therein; it is sufficient to say that he was possessed of a certain interest in the residue of a certain term of years. *Taylor v. Cole*, 3 T. R. 292.

(c 3) *Of averring a return.*

In justifying under a *fi. fa.* it need not be shewn to have been returned. *Cheasley v. Barnes*, 10 East, 73; *supra*, pl. 4.

(c 4) *Under the process of an inferior court.*

A justification under the final process of an inferior court, stating,—that the plaintiff below levied his plaint in a plea of trespass on the case for a cause of action arising within the jurisdiction of the court, is sufficient. *Rowland v. Veale*, Cowp. 18.

PROHIBITION.

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(b) *Whether absolutely or conditionally*, p. 828.

(c) *On the ground of jurisdiction.*

(c 1) *General rules*, p. 828.

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IV. OF COSTS IN.

(a) *Under stat. 2 & 3 Edw. VI.*, c. 13, s. 14, p. 830.

I. WHEN GRANTABLE OR NOT.

(a) *General rules.*

Prohibition will not be granted if the matter be not material. *Butterworth v. Walker*, 3 Burr. 1689.

(b) *Whether absolutely or conditionally.*

Where the Admiralty, for instance, are proceeding without jurisdiction, a prohibition will be granted without imposing terms, however consonant to equity. *Velthasen v. Ormsley*, 3 T. R. 315.

(c) *On the ground of jurisdiction.*

(c 1) *General rules.*

1. In prohibition, the question is, whether the court has a jurisdiction, and not whether the jurisdiction is exercised in a formal and regular way. *Smart v. Wolff*, 3 T. R. 347.

2. Where in the course of proceedings in an inferior court a matter is suggested, over which they have no jurisdiction, a prohibition will not lie unless they are discussing it. *Dutens v. Robson*, 1 H. B. 100.

3. If the court below have jurisdiction over the subject, though their judgment is mistaken, no prohibition, but only an appeal, lies. *Lord Camden v. Horne*, 4 T. R. 397.

4. A prohibition will not be granted to the ecclesiastical court against making a decree in a matter within its jurisdiction, such as the granting a faculty to erect a monument in the body of the church, with consent of the ordinary, though against that of the rector; and even after decree the only remedy against the decree is, by

appeal; if in executing the decree a legal right has been violated, the party has a remedy at law. *Bulwer v. Hase*, 3 East, 217.

5. If it appears that an ecclesiastical judge has either no jurisdiction, or has exceeded his jurisdiction, the court of K. B. will grant a prohibition. But, if the spiritual court has jurisdiction, though it is proceeding erroneously, or, as it is termed, *inverso ordine*, the court will not interpose. *Ackerley v. Parkinson*, 3 M. & S. 411.

6. If an ecclesiastical court give a wrong sentence on the merits, in a matter within its jurisdiction, the error can only be rectified by appeal; not by prohibition. But where it proceeds without jurisdiction, a prohibition lies; as where, though at the commencement of the suit it had jurisdiction, yet that has been taken away by the parties being at issue on a fact; which, since it cannot proceed by the rules of the common law, it has no power to try. *Leman v. Goulty*, 3 T. R. 3.

(c 2) *Before and after sentence.*

1. A prohibition to an inferior court, may be granted at any time before final judgment. *Darby v. Cosens*; *Notley v. Same*, 1 T. R. 552.

2. Where a matter is properly triable at common law, prohibition lies before sentence. But, if a party submit to trial, it is afterwards too late. *Full v. Hutchins*, Cowp. 424.

3. Prohibition lies after sentence, if the ecclesiastical court has no cognizance of the cause. *Secus*, if there be only a defect of trial. *Full v. Hutchins*, Cowp. 424.

4. If a prohibition to the court of admiralty be applied for before sentence, the superior court will examine into the case and see the ground of the proceedings in the admiralty courts. After sentence, the party applying must shew a nullity of jurisdiction on the face of the proceedings. *Ladbroke v. Crickett*, 2 T. R. 649.

5. A prohibition, after sentence, will not be granted, unless it be shewn clearly, that the court below had no jurisdiction; not if the matter be doubtful. *Carslake v. Mappedoram*, 2 T. R. 473.

6. A prohibition to a spiritual court after sentence, will not be granted, unless it appears upon the face of the proceedings

that they had no jurisdiction. *Leman v. Goulty*, 3 T. R. 5; *Lord Camden v. Home*, 4 T. R. 397; *Buggin v. Bennett*, 4 Burr. 2035; *Blaguire v. Hawkins*, Dougl. 378.

7. Where the ecclesiastical court, though in a matter of which they have original jurisdiction, incidentally determine a question of common law cognizance,—such as the construction of an act of parliament—erroneously, a prohibition may go after sentence; and, whether the point appear on the face of the libel, or only from a view of all their proceedings, is the same. *Gare v. Gapper*, *Gould v. Gapper*, 3 East, 472; 5 East, 345; 1 Smith, 528. See *supra*, (c 2), pl. 4.

8. Prohibition denied after sentence, where the defendant below had set up several customs respecting tithes, but had submitted to trial. *Full v. Hutchins*, Cowp. 422.

(c 3) *Miscellaneous cases.*

1. *Semble*, if an inferior court adjudge generally, that a plea which ousts them of their jurisdiction is insufficient, it will be presumed that the judgment proceeded not upon a want of form, but upon the merits of the plea; and therefore a prohibition will be granted. *Darby v. Cosens*; *Notley v. Same*, 1 T. R. 552.

2. If a cause appealed from an inferior court having no jurisdiction, is remitted to the inferior court by the court of appeal, with a judgment for costs against the appellant, a prohibition will be granted, as well to the court of appeal, touching the costs, as to the inferior court; costs being a mere incident to the principal matter. *Darby v. Cosens*; *Notley v. Same*, 1 T. R. 552.

3. An affidavit that the defendant in an ecclesiastical suit for tithes, has answered on oath, shewing a modus, is of itself ground sufficient for a prohibition as to the trial of the modus. *French v. Trask*, 10 East, 348.

4. Even admitting that the misconstruction of an act of parliament is a ground for a prohibition, and not mere matter for an appeal; it will not be granted, unless it be made appear by the party applying, that he insisted below on an opposite construction. *Home v. Lord Camden*, 2 H. B. 533. See *supra*, (c 2), pl. 7.

5. Where a vessel is prosecuted in the Exchequer, as forfeited for smuggling,

and in the Admiralty as a prize, the court of Exchequer will not grant a prohibition at the desire of the owner. *The Attorney General v. Appleby*, 8 Anst. 863.

(d) *On the ground of convenience.*

Where the sessions under stat. 43 Geo. III, c. 59, direct an old bridge to be taken down, that the materials may be employed in building the new one upon a different site, a prohibition will not be granted, though on affidavits of great inconvenience. *Rex v. Justices of Dorset*, 15 East, 594.

(e) *To restrain waste in a bishoprick.*

Prohibition to restrain waste in a bishoprick, does not lie in the C. B; at least at the suit of an uninterested person. *Jefferson v. The Bishop of Durham*, 1 B. & P. 105.

II. OF SUGGESTIONS FOR.

(a) *When requisite.*

Before a prohibition can be obtained, the party must suggest what has been done in the court below. If the suggestion be untrue, the other side may move to quash it; otherwise the court will take it for granted. *Darby v. Cozens*; *Notley v. Same*, 1 T. R. 55a.

(b) *Form of.*

A suggestion for a prohibition must not conclude, "and it is granted," &c. The party can only *pray* for a prohibition; whether it shall be *granted* or not, depends on the judgment of the court. *Smart v. Wolff*, 3 T. R. 347.

(c) *Affidavit in support of.*

In moving for a prohibition, where the want of jurisdiction appears upon the face of the proceedings, an affidavit to verify the truth of the suggestion is not necessary; though every suggestion which does not appear upon the face of the proceedings, but is collateral, and out of them, ought to be so verified. *Buggin v. Bennett*, 4 Burr. 2035. *Caton v. Burton*, Cowp. 330.

III. OF THE PROCEEDINGS IN.

(a) *Of declaring in.*

The court will not put the party to de-

PROPERTY.

clare in prohibition, if they are clearly of opinion against granting the prohibition. *Lindo v. Rodney*, Dougl. 620.

(b) *Of the issue in.*

(b 1) *In the case of a modus.*

Where, in prohibition, issue is taken on a modus pleaded by the plaintiff, the only question at the trial, is, whether that particular modus exists; so that if it be not proved exactly as laid, the defendant is entitled to the verdict and costs. But if any modus be found by the jury, though different from the one alleged, no writ of consultation will be awarded, since it appears to the court that none ought to go. *Brock v. Richardson*, 1 T. R. 427.

(c) *Of procedendo.*

(c 1) *Whether stayed for error apparent.*

A *procedendo* will not be stayed on the ground of error upon the face of the proceedings; but the defendant will be left to his writ of error. *Horton v. Beckman*, 6 T. R. 760.

IV. OF COSTS IN.

(a) *Under stat. 2 & 3 Edw. VI, c. 13, s. 14.*

The stat. 2 & 3 Edw. VI, c. 13, s. 14, only applies where the party, hindered by the prohibition, acquiesces in it; not where he compels the other to declare in prohibition, and makes the matter triable by a jury. *Trask v. French*, 15 East, 574.

PROPERTY.

I. OF SPECIAL OWNERSHIP.

(a) *Whether may be conditional,*
p. 831.

II. OF INCIDENTS TO.

(a) *The lex loci, where the owner resides,* p. 831.

III. IN ANIMALS FERÆ NATURE.

IV. OF RESTITUTION OF, UNDER 21 HEN. VIII, c. 11.

(a) *Limited to cases of felony,*
p. 831.

(b) *Relation of title,* p. 831.

V. OF ACTS JUSTIFIABLE IN DEFENCE OF.

- (a) *Personal violence in defence of real property*, p. 831.

VI. WHETHER DIVESTED BY CONVERSION AND ALTERATION, p. 831.

I. OF SPECIAL OWNERSHIP.

- (a) *Whether may be conditional.*

There may be a qualified special ownership, as well as an unconditional one. Thus, if a stable or warehouse be demised, under a restriction against using it as a shop, the tenant is not by reason of this restriction the less a special proprietor during the lease. *Rex v. Master*, 4 C. of Trinity House, 4 M. & S. 295.

II. OF INCIDENTS TO.

- (a) *The lex loci, where the owner resides.*

Personal property, wherever situate, is governed by the laws of that country in which the owner is domiciled. *Hunter v. Potts*, 4 T. R. 182.

III. IN ANIMALS PERE NATURE.

If A. start a hare in the grounds of B, hunt it into those of C, and there take it, the property therein is in A. *Churchward v. Studdy*, 14 East, 249.

IV. OF RESTITUTION OF, UNDER 21 HEN. VIII, c. 11.

- (a) *Limited to cases of felony.*

The stat. 21 Hen. VIII, c. 11, which re-vests in the owner the property of goods stolen, on prosecuting the felon to conviction, only extends to the case of felony, and not where they have been obtained by false pretences. *Parker v. Patrick*, 5 T. R. 175.

- (b) *Relation of title.*

The stat. 21 Hen. VIII, c. 11, which directs, that goods stolen shall be restored to the owner, upon conviction of the felon, by his evidence or procuration, does not invest the owner with his original title, if that title has been divested by a sale in market overt, or otherwise; but gives him a new one, commencing with the attainer. Whatever injury therefore has been offered to the property between the divesting and re-vesting of the title, gives the owner no right of action, since then he was not owner. And upon the same

principle, he cannot have trover against one who bought and re-sold the property in the interim; though notice of the felony was given to him before the re-sale. *Horwood v. Smith*, 2 T. R. 750.

V. OF ACTS JUSTIFIABLE, IN DEFENCE OF.

- (a) *Personal violence in defence of real property.*

If, on the defendant gently laying hands on the plaintiff to remove him from his close, the plaintiff resists, the defendant may oppose force to force. *Weaver v. Bush*, 8 T. R. 78.

VI. WHETHER DIVESTED BY CONVERSION AND ALTERATION.

1. Wherever the lawful property may be identified and traced out, the owner shall come and recover, when the thing has been unlawfully converted and changed; for though the possession has been changed, the property is not; nor will seizure into the hands of the Crown, in such case, be a bar. *Clarke v. Johnson*, Loft. 759. Vide *supra*, PRINCIPAL AND AGENT.

2. Trover is good to recover, where a felon has stolen goods, and changed them into notes, if the note clearly appears to be the product of the specific goods; and the owner of the goods, who has prosecuted to conviction, and has omitted to pray restitution, shall recover them in trover, though seized into the hands of the king, by an action against the sheriff. *Golightly v. Reynolds*, Loft. 89, 90.

PROPERTY-TAX ACT.

1. The ownership of trading vessels let to freight, is a trade, or concern in the nature of trade, within the meaning of the Property-tax Act, 46 Geo. III, c. 65. *The Attorney General v. Borrodaile*, 1 Price, 148.

2. The ship's husband, or managing partner, is bound to make a joint return of the aggregate profits of the concern, to the property-tax. *Ibid.*

QUAKER.

AFFIRMATION OF, WHEN ADMISSIBLE.

- (a) *In a penal action*, p. 832.

- (b) *In a criminal proceeding*, p. 832.

AFFIRMATION OF, WHEN ADMISSIBLE.

- (a) *In a penal action.*

A quaker's testimony on his affirmation, is admissible in debt on a penal statute. *Atcheson v. Everitt*, Cowp. 382.

- (b) *In a criminal proceeding.*

The affirmation of a quaker cannot be read in support of a criminal charge. *Rex v. Gardner*, 2 Burr. 1117.

QUARANTINE.

STATUTES RELATIVE TO.

- (a) 26 Geo. III, c. 6, s. 8.

It seems that none are liable to the penalties in the 8th section, stat. 26 Geo. III, c. 6, (relative to the performance of quarantine) but the captain, seamen, and passengers; not persons going on board ships arriving from infected places. *Rex v. Harris*, 4 T. R. 202.

QUARE IMPEDIT.

I. WHEN MAINTAINABLE.

- (a) *With reference to the relative situation of the parties*, p. 832.

II. OF THE DECLARATION.

- (a) *Amendment of*, p. 832.

III. OF THE GENERAL ISSUE IN.

p. 832.

IV. OF THE COSTS IN.

- (a) *On judgment for defendant on demurrer*, p. 832.

I. WHEN MAINTAINABLE.

- (a) *With reference to the relative situation of the parties.*

If the right of nomination be in A, and that of presentation in B, *quare impedit* lies by A. for disturbing his right, either against B. before presentation, or against the incumbent after. *Rex v. The Marquis of Stafford*, 3 T. R. 646.

II. OF THE DECLARATION.

- (a) *Amendment of.*

Declaration in *quare impedit* amended on motion. *Repton v. Tamworth School*, 2 Wils. 118.

III. OF THE GENERAL ISSUE IN.

In *quare impedit* there is no general issue. *Reed v. Brookman*, 3 T. R. 158.

IV. OF THE COSTS IN.

- (a) *On judgment for defendant on demurrer.*

A defendant obtaining judgment on demurrer in *quare impedit*, is not entitled to costs. *Thrale v. Bishop of London*, 1 H. Bl. 530.

QUAY,

PUBLIC.

- (a) *Community of.*

A public quay, like a public highway, is common to all the community. *Bolt v. Stennett*, 8 T. R. 606.

QUIT-RENT.

RELEASE OF.

- (a) *Presumption of.*

Mere length of time short of the period fixed by the Statute of Limitations, and unaccompanied by any circumstances, affords no ground to presume a release or extinguishment of a quit-rent. *Eldridge v. Knott*, Cowp. 214.

QUO WARRANTO.

I. WHEN IT LIES OR NOT.

- (a) *General rule*, p. 833.
 (b) *With reference to the party applicant*, p. 833.
 (c) *With reference to the nature of the office.*
 (c 1) *General rule*, p. 834.
 (c 2) *The office of churchwarden*, p. 834.
 (c 3) *Miscellaneous*, p. 834.
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II. WHEN GRANTABLE OR NOT.

- (a) *General rules*, p. 834.
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VIII. ON THE JUDGMENT IN.

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- (b) *Nature of,—whether quosque, or final*, p. 837.
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X. OF THE EXECUTION IN.

- (a) *Discharge from.*
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- (a) *On motion*, p. 838.

XIII. ON THE LIMITATION OF, p. 838.

I. WHEN IT LIES OR NOT.

- (a) *General rule.*

1. An information in nature of *quo warranto*, shall be granted where the right is doubtful and disputed, in order to try it, unless there has been such an acquiescence as ought to prevent it. *Rex v. Latham*, 3 Burr. 1485.

2. An information in nature of *quo warranto* will not lie for encouraging the exercise of a franchise. *Rex v. Marsden*, 3 Burr. 1812; 1 Blk. 579.

- (b) *With reference to the party applicant.*

1. The rule that an information in nature of *quo warranto* will not be granted at the instance of those who have concurred in the defendant's election, only holds where they knew of the defect which rendered it invalid; not therefore where it arises from the defendant's not having taken the sacrament within one year before his election, as required by stat. 13 Car. II, st. 2, c. 1; since that defect is a latent one. *Rex v. Smith*, 3 T. R. 573.

2. An information in nature of *quo warranto* will not be granted to a corporator who, though he did not concur in the defective election, afterwards acquiesced therein; the circumstance of his not opposing the party's subsequent election to a necessary annual office, and then attending official meetings at which he presided, is

not an acquiescence. *Rex v. Clarke*, 1 East, 38.

3. An information in the nature of *quo warranto*, will be refused to a mere stranger who has no concern with the corporation. *Rex v. Clarke*, 1 East, 46; *Rex v. Kemp*, *Ibid.* n.

4. An information in nature of *quo warranto*, the effect of which will be to dissolve the corporation, will not be refused because the relator attended the election in question, and others at which the defendant afterwards presided, unless it likewise can be presumed that he purposely delayed until the dissolution of the corporation became unavoidable. *Rex v. Morris*; *Same v. Stewart*, 3 East, 213.

(c) *With reference to the nature of the office.*

(c 1) *General rule.*

An information in nature of *quo warranto* will only lie for what are usurpations on the rights or prerogatives of the crown. *Rex v. Shepherd*, 4 T. R. 381.

(c 2) *The office of churchwarden.*

An information in nature of *quo warranto* does not lie for the office of churchwarden. *Rex v. Shepherd*, 4 T. R. 381.

(c 3) *Miscellaneous.*

1. The election of a portreeve of a borough and manor, who as portreeve is returning officer of the borough, may be the subject of an information in nature of *quo warranto*. And perhaps though he is not also returning officer. *Rex v. Mein*, 3 T. R. 596.

2. An information in nature of *quo warranto* lies for claiming to vote in virtue of a burgage tenement. *The case of the Borough of Horsham*, 3 T. R. 599, n. (a).

3. An information in nature of *quo warranto* lies for the office of bailiff of a borough and manor, who being a prescriptive officer and member of the court-leet, has power to summon and select the jury; for such discretionary power is a material and important function in the administration of justice. *Rex v. Bingham*, 2 East, 308.

(d) *From neglect to take the sacrament.*

The court are bound to grant an information in nature of *quo warranto* where the grounds are, the defendant's having

omitted to take the sacrament within one year previous to his election. *Rex v. Brown*, 3 T. R. 574, n. (b).

II. WHEN GRANTABLE OR NOT.

(a) *General rules.*

1. If circumstances are very strong in favour of a corporate franchise, and against the application for an information *quo warranto*, the rule *nisi* will be discharged, and with costs. *Rex v. Wardroper*, 4 Burr. 1963.

2. An information in nature, &c. will not be granted against a member of a corporation now dissolved, for continuing the exercise of his office. *Rex v. Saunders*, 3 East, 119.

3. A swearing in, though defective, is a sufficient user. *Rex v. Tate*, 4 East, 337.

4. Information in nature of *quo warranto* will be granted where the right depends upon a matter of doubtful law, that it may be finally settled. *Rex v. Carter*, Cowp. 58.

5. To found a *quo warranto* information, there must have been a possession or exercise of the office in question; a mere claim thereto, as a tender to be sworn in, is not sufficient. *Rex v. Whitwell*, 5 T. R. 85.

6. Where a doubt is raised on the affidavits for and against an information in nature of *quo warranto*, it will be granted, though the evidence preponderates against the relator, since the jury are the only judges between conflicting testimony. *Rex v. Mein*, 3 T. R. 596.

7. The court will not decide the validity of the election of a corporator, if the question is new or doubtful, on a rule to shew cause for an information in nature of *quo warranto*. *Rex v. Godwin*, Dougl. 397.

(b) *With reference to the party applicant.*

1. Where an application for an information in nature of *quo warranto* is made to enforce a general act of parliament, it is no objection that the party applying is not a member of the corporation; as where the grounds are that the defendant had not taken the sacrament within one year previous to his election. *Rex v. Brown*, 3 T. R. 574, n. (b).

2. An information in nature of *quo warranto* does not lie for a corporator whose title (or, where derivative, when the original title) is no better than the title questioned, and who therefore has himself

no title if his objection prevails. *Rex v. Cudlipp*, 6 T. R. 503.

III. OF PRELIMINARY STEPS.

(a) Disfranchisement.

A corporator must be disfranchised by the corporation for non-residence, before an information in nature of *quo warranto* can be applied for; as where by the constitution, the corporator, by removing from the borough, vacates his office. It would be productive of inconvenience to hold that non-residence is, *ipso facto*, a disfranchisement. *Rex v. Heaven*, 2 T. R. 772.

IV. OF THE APPLICATION FOR.

(a) Affidavit in support of.

(a 1) By whom made.

In support of an information in nature of *quo warranto*, the relator may use the affidavits of those who have concurred in the defendant's election. *Rex v. Symmons*, 4 T. R. 223.

(a 2) Form of.

1. An information in nature of *quo warranto* will not be granted after a lapse of twelve years, upon an affidavit of belief only, which is contradicted by entries in the corporation books. *Rex v. Newling*, 3 T. R. 310.

2. An affidavit in support of an information in nature of *quo warranto*, must state the mode of election to the office in question. *Rex v. Mein*, 3 T. R. 596.

3. An affidavit in support of an application for an information, in nature of *quo warranto*, for usurping a corporate office contrary to the provisions of a particular charter, must state that such charter has been accepted, or, whence the same thing may be inferred, been acted upon. It must appear that the constitution alleged to have been violated, is an existing one. *Rex v. Barzey*, 4 M. & S. 253.

(a 3) Deficiency in,—how aided.

1. If the affidavits in support of an information in nature of *quo warranto*, be deficient in the statement of necessary facts, recourse may be had to the affidavits in answer in which they are detailed. *Rex v. Mein*, 3 T. R. 596.

2. Where the merits of the election, if any, are sufficiently brought into question by the affidavits, and where it is not denied by the defendant; an information

in nature, &c. will be granted, though the fact of the election is not precisely sworn to. *Rex v. Harwood*, 2 East, 177.

(a 4) Amendment of.

An affidavit in support of an application for an information in nature of *quo warranto*, cannot be amended. *Rex v. Barzey*, 4 M. & S. 253.

(b) Defence to.

(b 1) Subsequent resignation.

A rule *nisi* is obtained in Trinity term, against several for an information in nature of *quo warranto*, for usurping corporate offices. Between Trinity and Michaelmas term they resign, and their resignations are accepted. Held, that the rule must be made absolute, this circumstance of the resignation being no answer to it, though it might regulate the discretion of the court in imposing the fine. *Rex v. Warlow*, 2 M. & S. 75.

(b 2) Subsequent lapse of the period of limitation.

The statute 32 Geo. III, c. 58, which passed for the quieting the possession of persons who had exercised franchises, and for preventing others from lying-by for a length of time, with latent objections to their titles, enables a defendant to an information in the nature of *quo warranto*, to plead that he held or executed the office six years before the exhibiting of the information. This period must be dated from the making the rule absolute, and not from the time of obtaining the rule *nisi*. Hence, a rule *nisi*, for such an information, will be discharged, if it appears that the defendant is in a condition to plead the statute; to make it absolute would be nugatory. *Rex v. Stokes*, 2 M. & S. 71.

(c) Of shifting the grounds of.

Whether where the original ground of application for an information in nature of, &c. fails, it will be granted for the trial of an incidental and secondary question. *Rex v. Osbourne*, 4 East, 327.

V. OF THE PARTIES TO.

(a) Prosecutor,—who considered as.

The practice in informations in nature of *quo warranto*, is, for the parties upon whose affidavits the rule for the information is obtained, afterwards to make such

person as they think fit relator; so that the relator is not the real prosecutor. However, the relator is *prima facie* to be considered as the real prosecutor; an application therefore, that the prosecutor may give security for costs on account of his poverty, will be dismissed; *aliter*, had it shewn that he was only an instrument in the hands of others. *Rex v. Sir W. W. Wynne*, 2 M. & S. 346.

(b) *Joinder of.*

1. One information only may, by leave of the court, be exhibited under the Irish st. 19 Geo. II, c. 2, s. 4, against different persons, and against the same persons for usurping different franchises. And there is no occasion to state such leave on the record. *Symmers v. The King*, Cowp. 489.

2. There must be separate informations against several for usurping separate offices of the same corporation, in order to enable each defendant to disclaim, the offence not being joint. Though one only may be tried, and the rest suspended upon an undertaking of the other parties to disclaim according to the event of the trial. The court, therefore, will not consolidate them. *Rex v. Warlow*, 2 M. & S. 75.

(c) *Mode of describing.*

An information against persons by the name of the mayor and citizens of C, for claiming to be a body corporate, imports not that they are a corporation, but the contrary. *Rex v. Amery*; *Same v. Monk*; 2 T. R. 515.

VI. ON THE MODE OF CONVEYING.

(a) *Summary jurisdiction.*

After an information in nature of *quo warranto* has been granted, the court will not interfere to controul the manner of conducting it; therefore, having granted one for claiming to be common councilman, they refused to strike out or direct a *nolle prosequi* to be entered to a replication controverting the defendant's title as freeman, which he had pleaded as introductory to that of common councilman. *Rex v. Brown*, 4 T. R. 276.

VII. ON THE PLEADINGS IN.

(a) *Of the plea.*

(a 1) *Time allowed for.*

The time of pleading to informations

in nature of *quo warranto*, is regulated thus: after the defendant has appeared, two four-day rules to plead must be given; at the expiration of the last, a peremptory rule to plead may be moved for in term; if not moved for, the defendant has till the next term. *Rex v. Ginetter*, 6 T. R. 594.

(a 2) *Withdrawing of, and pleading de novo.*

If the defendant in an information in nature of *quo warranto*, discovers, before trial, that he has pitched upon the weaker defence, he may, upon terms, quit it, and insist upon the stronger. *Rex v. Grimes*, 4 Burr. 2147.

(a 3) *Of double pleas.*

1. The defendant in an information in nature of *quo warranto*, is entitled, under stat. 32 Geo. III, c. 58, to plead several pleas, although the limitation of time does not form one of them. *Rex v. Autridge*, 8 T. R. 467.

2. Double pleading in an information in nature of *quo warranto*, is only permitted where the defendant is a corporate officer. *Rex v. Richardson*, 9 East, 469.

(a 4) *Miscellaneous.*

1. By a new charter the election to an office in the corporation, was to be made in the mode in use at a particular period in former time. A plea to an information in nature of *quo warranto*, for exercising the office, claiming it under an election pursuant to the charter, must shew what the mode of election was at the named period, in what way soever it originated. *Rex v. Birch*, 4 T. R. 608.

2. In an information in nature of *quo warranto*, the defendant pleaded a charter of incorporation, whence it appeared, that on the office, which the defendant was accused of usurping, namely, that of mayor becoming vacant by death, another mayor was to be elected after a prescribed form. The defendant then pleaded, that on such a day the office of mayor became vacant, not stating by what accident it became vacant, and shewed that he was elected in the form prescribed. Held, that the plea was bad, since, for any thing that appeared, the vacancy happened from some other cause than the death of the mayor; and also, for any thing that appeared, there was to be a different mode of election

where the vacancy happened not by death, than in the case where it did. Had the defendant averred that there was no provision in the charter for filling up the office of mayor in any instances, but that of a vacancy by death, this might have raised a presumption, that in instances not named there was to be an election in the mode which is prescribed in the instances which were named; but the want of such a negative allegation precluded the court from raising such a presumption. *Rex v. Smith*, 2 M. & S. 583.

(b) *Of the replication.*

(b 1) *Duplicity in.*

A prosecutor in a *quo warranto* information, or in an information in nature of a *quo warranto*, is allowed to reply specially, and to put as many matters in issue as he pleases; but the new matter introduced in the replication ought to be consistent with the matter contained in the plea. *Rex v. Knight*, 4 T. R. 419.

(b 2) *Miscellaneous.*

By the constitution of a corporation, there are to be, *inter alios*, one mayor and eleven aldermen; on the vacancy of the mayoralty, the burgesses are to nominate two of the aldermen as for the mayor, and the residue of the aldermen, of whom the late mayor, (being an alderman) was to be one, or the major part of them, are to choose one of the two. In an information in nature of *quo warranto* against the defendant, for usurping the office of mayor, he pleaded, that on such a day the office of mayor was vacant, that himself and one J. S. were nominated, and that himself was elected by the residue of the aldermen. The replication to the plea affirmed, that only five aldermen were present. The defendant demurred. Judgment was given for the crown. For the defendant had not shewn how the office of mayor became vacant, and no presumption could be formed that the vacancy was occasioned by an accident, which prevented the late mayor from voting as one of the aldermen, for instance, by the accident of death, or forfeiture. The inference then was, that he formed one of the "residue of the aldermen." Five, then, were not a majority; and the replication, therefore, if unanswered, is an answer to the plea. The defendant,

therefore should, as he might have done, rejoined, by stating circumstances to shew, that five, in the then state of the corporation, constituted a majority. *Rex v. Smith*, 2 M. & S. 583.

(c) *Of amendments in.*

(c 1) *After argument.*

A plea to an information in nature of *quo warranto*, may be amended after argument of a demurrer thereto. *Rex v. Birch*, 4 T. R. 608.

VIII. ON THE JUDGMENT IN.

(a) *General rule.*

If a defendant, upon an information in nature of *quo warranto*, fails in the title he sets up, judgment must be for the crown. *Rex v. Leigh*, 4 Burr. 2143.

(b) *Nature of, whether quosque, or final.*

Semble, that if the title to a corporate office, is only defective from an irregular swearing in, the judgment against the party in an information, in nature of *quo warranto*, should be a judgment of *capitur pro fine* for the temporary usurpation, or a judgment of *quosque*, and not a general judgment of ouster. *Rex v. Clarke*, 2 East, 75; but see 9 East, 246.

(c) *Legal effect of.*

One who has had judgment of complete ouster against him, upon a disclaimer generally, in an information in nature of *quo warranto*, is precluded from afterwards setting up his original right; though he was sworn in subsequent to the judgment, under a peremptory *mandamus*; for a *mandamus to swear in*, confers no title. *Rex v. Clarke*, 2 East, 75; *Rex v. The Burgesses of Truro*, 1d. 85, as to the last point.

IX. OF THE COSTS IN.

(a) *To the prosecutor.*

(a 1) *General rule.*

On a judgment for the relator in an information in the nature of a *quo warranto*, he is entitled to costs. *Rex v. Amery*, 1 Anst. 178.

(a 2) *On verdict, or judgment, as to part.*

There is no analogy between informations in nature of *quo warranto*, and civil proceedings. The rule of K. B., therefore, in civil suits, that a plaintiff is en-

titled to the costs of those issues only which are found for him, does not govern in these; touching which, the rule, founded on uniform practice, is, that the prosecutor succeeding on one issue only, and having judgment of ouster thereon, is entitled to the costs of all the issues. *Rex v. Downes*, 1 T. R. 453.

(a 3) *Under 9 Ann, c. 20.*

The word "places," in the stat. 9 Ann. c. 20, means places of the same kind with those before enumerated, to which alone, therefore, the provisions of the act extend. Hence, under the 5th section, the court cannot award costs to the relator, in an information in nature of *quo warranto*, for usurping the office of constable, the same not being a borough or corporate office. *Rex v. Wallis*, 5 T. R. 375; *Same v. Dickenson*, 381, n. (a).

X. OF THE EXECUTION IN.

(a) *Discharge from.*

(a 1) *How obtained.*

A defendant in execution under a writ, on a *quo warranto* information, as well for the contempt as for the relator's costs indorsed thereon, is not entitled to his discharge on payment of the fine only. *Rex v. Pickerill*, 4 T. R. 809.

XI. OF NEW TRIALS IN.

(a) *After verdict for prosecutor.*

A new trial will be granted in an information in nature of *quo warranto*, after verdict for prosecutor. *Rex v. Malden*, 4 Burr. 2135.

(b) *After verdict for defendant.*

An information in the nature of *quo warranto*, is now considered merely a civil proceeding; therefore a new trial therein may be granted after verdict for the defendant. *Rex v. Francis*, 2 T. R. 484.

XII. OF QUASHING.

(a) *On motion.*

A *quo warranto* information cannot be quashed on motion, though both parties consent. *Rex v. Edgar*, 4 Burr. 2297.

XIII. ON THE LIMITATION OF.

1. Informations in nature of *quo warranto*, will not be granted after six years

possession. *Rex v. Dicken*, 4 T. R. 282; *etiam stat.* 32 Geo. III, c. 58.

2. A title to one office, which is a qualification to hold another office, is not within stat. 3, of 32 Geo. III, c. 58, respecting derivative titles, and, therefore, although the party has exercised the first for six years, the court will make the rule *nisi* for an information in nature of *quo warranto*, for exercising the second office, upon a defect of title to the first, absolute. *Rex v. Stokes*, 2 M. & S. 71.

RANSOM.

CONTRACTS OF.

(a) *What considered as, p. 838.*

(b) *Properties of.*

(b 1) *In relation to a re-capture, p. 838.*

(c) *Rights thereon, p. 838.*

(a) *What considered as.*

1. A purchase by the owner, in a neutral country, of his ship condemned there as prize by an enemy, is illegal as a ransom. *Havelock v. Rockwood*, 8 T. R. 268.

2. An action does not lie on a bill of exchange given to the plaintiff, for money advanced by him for the express purpose of effectuating a ransom contrary to stat. 45 Geo. III, c. 72. *Webb v. Brooke*, 3 Taunt. 6.

(b) *Properties of.*

(b 1) *In relation to a re-capture.*

The property in a ransom bill, secreted and not delivered up to the re-captor, is not divested by the re-capture of the vessel with the hostage and ransom bill on board. *Cornu v. Blackburne*, Dougl. 641.

(c) *Rights thereon.*

An action was maintainable by an alien on a ransom bill. *Record v. Bettensham*, 3 Burr. 1734; 1 Blk. 563. See now 22 Geo. III, c. 25; 45 Geo. III, c. 72.

RECEIPT,

CONCLUSIVE NATURE OF.

A receipt is not conclusive against the party signing it. *Straton v. Rastall*, 2 T. R. 366.

RECEIVER GENERAL.

OF HIS SETTING INSUPER UPON A PARISH.

(a) *Preliminary steps.*

It is not sufficient that the Receiver General swears to his account before the 5th April, to enable him to set insuper upon a parish, unless the account is declared and passed within that time. *Ex parte Borough of Liskeard*, Wightw. 97.

RECEIVING STOLEN GOODS.

I. NATURE OF THE OFFENCE.

(a) *Within 22 Geo. III, c. 58, p. 839.*

II. INDICTMENT FOR.

(a) *Negative averments.*

(a 1) *Conviction of principal, p. 839.*

I. NATURE OF THE OFFENCE.

(a) *Within 22 Geo. III, c. 58.*

The receiving of stolen goods is an offence within stat. 22 Geo. III, c. 58, s. 1, though the principal has been convicted, provided the principal was guilty of petty larceny only. *Rex v. Barter*, 5 T. R. 83.

II. INDICTMENT FOR.

(a) *Negative averments.*

(a 1) *Conviction of principal.*

If, in the description of a crime, there be any thing in the negative, the affirmative of which would be an excuse for the defendant, the proof lies upon him, and need not be stated in the indictment. Hence, in an indictment under stat. 22 Geo. III, c. 58, s. 1, for receiving stolen goods (which, if the offence, in the principal, be grand larceny, &c. is only an offence in the receiver, provided the principal has not been convicted) it need not be averred that the principal has not been convicted. *Rex v. Barter*, 5 T. R. 83.

RECOGNIZANCE.

I. OF THE INTEREST THEREIN.

(a) *Of the crown, p. 839.*

II. OF COMMITMENT THEREON.

(a) *Discharge from, p. 839.*

I. OF THE INTEREST THEREIN.

(a) *Of the crown.*

The king is only a trustee for the party in a forfeited recognizance. *Rex v. Eyres*, 4 Burr. 2118.

II. OF COMMITMENT THEREON.

(a) *Discharge from.*

A defendant having been committed to prison on a forfeited recognizance, whereby his wife and family are become burthen-some to the parish, is not a sufficient ground for the discharge of the defendant from such recognizance. *Rex v. Strancker*, 3 Price, 261.

RECORD.

I. PROPERTIES OF.

(a) *Conclusive nature of, p. 839.*

II. ALTERATION IN.

(a) *How made, p. 839.*

III. PLEADINGS RELATIVE TO.

(a) *Of the plea of nul tiel record, p. 840.*

IV. ON THE PROOF OF.

(a) *By a copy, p. 840.*

V. OF WITHDRAWING THE RECORD IN AN ACTION:

(a) *Terms of, p. 840.*

I. PROPERTIES OF.

(a) *Conclusive nature of.*

The record of a court of competent jurisdiction, imports incontrovertible verity as to all the proceedings which it sets forth as having taken place. An averment to the contrary, therefore, in pleading, cannot be made. *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

II. ALTERATION IN.

(a) *How made.*

An alteration in a record cannot be made without leave of the court even with

consent of the opposite party. *Dickinson v. Plaisted*, 7 T. R. 475.

III. PLEADINGS RELATIVE TO.

(a) *Of the plea of nul tiel record.*

The plea of *nul tiel record*, and giving a day, makes a complete issue; so that if the adverse party demurs, the other need not join in demurrer, but on failure at the day, may sign judgment. *Tipping v. Johnson*, 3 B. & P. 302.

IV. ON THE PROOF OF.

(a) *By a copy.*

It is sufficient proof of the copy of a record, that the original was read to the witness by the proper officer, and that the copy agreed. *Rolf v. Dart*, 2 Taunt. 52.

V. OF WITHDRAWING THE RECORD IN AN ACTION.

(a) *Terms of.*

A record may be withdrawn unconditionally, on a fair presumption arising that an impartial trial cannot be had. *Mullings v. —*, 5 Taunt. 88.

RECORDARI,

(*Writ of.*)

(a) *Its legal effect*, p. 840.

(b) *Appearance to*, p. 840.

(a) *Its legal effect.*

The writ of *re. fa. lo.* stays all further proceedings in the county court, though delivered after interlocutory, if it be before final judgment. *Bevan v. Prothesk*, 2 Burr. 1151.

(b) *Appearance to.*

A writ of *recordari* virtually includes a summons to both parties to appear on the day prefixed. *Davies v. James*, 1 T. R. 371.

RELEASE.

I. BY COVENANT NOT TO SUE.

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(b) *In the case of joint contractors*, p. 840.

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III. RELEASE OF AN ACTION.

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(b) *By a co-plaintiff.*

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(c) *By a nominal plaintiff.*

(c.1) *Relative to setting it aside*, p. 841.

I. BY COVENANT NOT TO SUE.

(a) *In the case of a sole contractor.*

Where an obligee covenants not to sue the obligor at all, he may plead it as a release to avoid a circuity of action. *Dean v. Newhall*, 8 T. R. 168.

(b) *In the case of joint contractors.*

1. Where an obligee covenants not to sue one of two joint and several obligors, and if he did that, the deed of covenant might be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*, 8 T. R. 168.

2. Two partners, A. and B., on 26th August 1809, agree to dissolve the partnership, as from 1st January 1810, and that neither of them shall, after signing the deed of dissolution, make any purchase to bind the other; but that every such purchase shall be on his own private account. On 27th October 1810, A. assigns his property to his creditors, who covenant not to sue him, and that if they do, the deed of assignment shall be a release to him, which deed is signed by B. A, after signing the deed of dissolution, having contracted debts in the name of the firm, B. pays them. Held, 1. That B. was liable for those debts, the covenant not to sue A, not operating as a release to B:—2. That supposing it had, the creditors would have had an equitable claim on B, which would have justified his paying the money; and therefore that B. was entitled to recover it from A, as money paid to his use. *Hutton v. Eyre*, 1 Mars. 603; 6 Taunt. 283.

RELEASE.

II. CONSTRUCTION OF.

(a) General rules and illustrations.

1. In the construction of an instrument, regard must be had to all its parts, and especially to the particular expressions therein. Therefore, general words in a deed, are to be restrained by a particular recital. For which rule the reason may be, that the parties cannot be supposed to have used words without meaning; a supposition included in the rejection of particular expressions. If full effect is given to the general words, the particular expressions are thereby passed over; but not *vice versa*, since thereby effect is given to the general words, namely, qualified and consistent with the particular expressions.—Hence, where to an action of debt on a bond, the defendant pleaded a release from the plaintiff, which, after reciting that the defendant stood indebted to him in such a sum; he, in consideration of 15 s. in the pound paid to him, “released the defendant from all manner of actions, causes of action, suits, debts, claims, and demands in law and equity, which he had against him, or thereafter could, should or might have, by reason of any thing from the beginning of the world to the date of the release;” held, that the plaintiff might reply, that although the present demand was due when the release was made, yet it was not included, or meant to be included, in the sum named therein. *Payler v. Homersham*, 4 M. & S. 423.

2. If the provisions in a deed, are, upon the face of them, applicable to two different situations of things, it may be averred to which of the two they were meant to be applied. Thus, if A. owes B. 20 l., which gross sum is composed of separate items, and B. releases to A. 10 l., B. may shew to what particular items the release was intended to be applied. *Payler v. Homersham*, 4 M. & S. 423.

(b) In a particular instance.

A, after mentioning certain specific sums due to her from B, and that she had agreed to release him from those sums, and of and from all or any other sum or sums of money, claims and demands thereby secured or intended to be secured, and all other sum or sums of money, claim and demand whatsoever, released him accordingly from those sums and all claim on account of those sums, or for or on

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account of any other matter, cause or thing whatsoever. Held, that a bond of indemnity, payable after her decease, was not thereby released. *Butcher v. Butcher*, 1 N. R. 113.

III. RELEASE OF AN ACTION.

(a) Who are competent to make.

The real parties alone are competent to release the action; and those are the real parties who are parties upon record. *Doc*, ex dem. *Byne, v. Brewer*, 4 M. & S. 300.

(b) By a co-plaintiff.

(b 1) Relative to setting it aside.

Release by co-plaintiff not set aside without a strong case of fraud. *Jones v. Herbert*, 7 Taunt. 421.

(c) By a nominal plaintiff.

(c 1) Relative to setting it aside.

If a defendant, who is sued by a landlord in the name of his tenant, procure a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed in the action. *Payne v. Rogers*, Dougl. 407.

REMAINDER.

(See DEVISE, ESTATE.)

I. CONTINGENT.

(a) Whether vested or contingent.

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(a 3) Relative to the time of vesting, p. 842.

(b) Valid or not.

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II. CROSS REMAINDERS.

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(a 1) Form of, p. 843.

(b) Implication of.

(b 1) In the case of a deed, p. 843.

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III. REMAINDER-MAN.

(a) *Relative to charges created by the particular tenant.*

(a 1) *In the case of personalty,* p. 843.

(b) *Relative to leases by the particular tenant.*

(b 1) *Executed by the tenant only,* p. 843.

(b 2) *Whether confirmed by acceptance of rent,* p. 843.

I. CONTINGENT.

(a) *Whether vested or contingent.*

(a 1) *General rule.*

A remainder will never be construed as contingent where it can be taken for vested; because the latter tends to support the estate, the former to destroy it,—by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment. *Ives v. Legge*, 3 T. R. 488, n. (a).

(a 2) *In particular instances.*

1. An estate is surrendered to the use of A. for life; after his decease to his wife B, during her widowhood; after his decease, and upon the marriage of B, then to C. for life; and after his decease to the issue of his body; C. takes a vested remainder. *Wright*, ex dem. *Burrill*, v. *Kemp*, 3 T. R. 470.

2. Grandfather, father and two children. Grandfather conveys lands to a trustee, to the use of himself for life, remainder to the use of his son for life, remainder to the trustees to preserve contingent remainders; remainder to the use of such child or children of the son, begotten or to be begotten, as the son should appoint, and in default of such appointment, "to the use of all and every the children of the son, and the heirs of their several and respective bodies, as tenants in common, but, if only one such child, to the use of such only child, and the heirs of his or her body," remainder to the right heirs of the grandfather in fee. He conveys the fee to C. The son has other children afterwards, and dies without appointing. Held, that the remainders to the children were not contingent, depending on the event of the father not appointing, but vested, and that as cross-remainders cannot be im-

plied in a deed, the shares of those children who died without issue, did not vest in the survivors, but fell into the reversion in fee. *Doe*, ex dem. *Tanner*, v. *Dorrell*, 5 T. R. 518.

(a 3) *Relative to the time of vesting.*

The law always leans in favour of the vesting of estates; hence, the decisions which have held, that a remainder shall vest on the birth of a child, without waiting for the death of its parents, since otherwise, if the child died before its parents, the estate would not go to grandchildren. *Doe*, ex dem. *Comberbach*, v. *Sir R. Perryn*, 3 T. R. 494, 5.

(b) *Valid or not.*

(b 1) *As too remote.*

1. A trust of a term, to arise on the contingency, that 1. A. & B. shall die without leaving issue male; or, 2. That such issue male shall die without issue; is good, in case A. & B. have a son who dies sans issue in the life-time of the survivor. *Longhead*, d. *Hopkins*, v. *Phelps*, 2 Blk. 704.

2. A limitation to B, after failure of issue to A, is too remote. *Habergham* v. *Vincent*, 5 T. R. 92.

(c) *Construction of.*

Settlement of the wife's estate on herself for life, remainder to the husband for life, if any issue of the marriage so long live, remainder, if she dies sans issue, of one moiety to him in fee, and of the other to the wife's relations. The husband's remainder in fee does not arise, unless he survives the wife. *Moorhouse* v. *Wainhouse*, 1 Blk. 638.

(d) *Destruction of.*

(d 1) *General rule.*

The rule, that a contingent remainder is destroyed by destruction of the particular estate, is fixed. *Doe*, ex dem. *Willis*, v. *Martin*, 4 T. R. 39.

(d 2) *In the case of a copyhold.*

In the case of copyhold or customary estate, a contingent remainder is destroyed by destruction of the particular estate after an enfranchisement. *Roe*, ex dem. *Clemett*, v. *Briggs*, 16 East, 406.

(d 3) *In miscellaneous cases.*

1. If a freehold is limited on a contin-

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gency to the survivor of A. & B, and both are living when the contingency happens, the remainder is destroyed. *Habergum v. Vincent*, 5 T. R. 92.

2. Contingent remainder, with double aspect, destroyed by merger of the particular estate which supported it. *Crump, d. Woolley, v. Norwood*, 7 Taunt. 362.

II. CROSS-REMAINDERS.

(a) Creation of.

(a 1) Form of.

No technical words are required to create cross-remainders. *Doe, ex dem. Watts, v. Wainwright*, 5 T. R. 427.

(b) Implication of.

(b 1) In the case of a deed.

In the case of a deed cross-remainders can never be implied. *Doe, ex dem. Tanner, v. Dorrell*, 5 T. R. 518.

(c) Extent of.

Lands were limited by deed to the use of the child or children of B: in tail as tenants in common,—“and in case any such child or children should die, without issue of his, her or their bodies, then the part of such child should be and remain to the use of the surviving child or children of A, and the heirs of his, her or their bodies issuing, and so, *toties quoties*, as any of the said children should die without issue, till there should be only one child left, and in case all the said children should die without issue, then,” &c. Held, that cross-remainders were created as well between the children as between the surviving children and the heirs of those deceased. *Doe, ex dem. Watts, v. Wainwright*, 5 T. R. 427.

III. REMAINDER-MAN.

(a) Relative to charges created by the particular tenant.

(a 1) In the case of personalty.

Since possession of personalty is not proof of ownership, a pawnee's title to the property bailed cannot be better than that of the bailor. Therefore, the pawnee of a tenant for life has no lien, for the money advanced, against the remainder-man. *Hoare v. Parker*, 2 T. R. 376.

(b) Relative to leases by the particular tenant.

(b 1) Executed by the tenant only.

An indenture of lease expressed to be

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made by a tenant for life and the remainder-man, but executed by the tenant for life only, is, as against the remainder-man, utterly void; who, therefore, after the death of the tenant for life cannot sue upon the covenants therein. *Ludford v. Barber*, 1 T. R. 86.

(b 2) Whether confirmed by acceptance of rent.

A lease void in its creation as against a remainder-man, does not become valid by his accepting rent, and suffering the lessee to make improvements, after his remainder vests in possession. *Doe, d. Simpson, v. Butcher*, Dougl. 50; *Jenkins, d. Yate, v. Church*, Cowp. 482.

REMEDIAL STATUTE.

I. ON THE CONSTRUCTION OF.

(a) In particular instances.

(a 1) Against secreting ejectments, p. 843.

II. OF THE PENALTY INFLICTED BY.

(a) Nature of, p. 843.

III. OF THE ACTION UNDER.

(a) Limitation of, p. 843.

I. ON THE CONSTRUCTION OF.

(a) In particular instances.

(a 1) Against secreting ejectments.

The stat. 11 Geo. II, c. 19, s. 12, relative to the secreting ejectments by tenants, extends to those cases only where the ejectment is inconsistent with the landlord's title, and is brought to obtain possession; not therefore to one by a mortgagee of the premises, and brought to compel attornment. *Buckley v. Buckley*, 1 T. R. 646.

II. OF THE PENALTY INFLICTED BY.

(a) Nature of.

The damages given by a remedial statute are not in the nature of a penalty, but are a compensation for an injury sustained. *Woodgate v. Knatchbull*, 2 T. R. 154.

III. OF THE ACTION UNDER.

(a) Limitation of.

The statute 31 Eliz. c. 5, limiting the time for suing on a penal statute, does not,

extend to suits on remedial statutes.
Spieres v. Frederick, 2 T. R. 155, n. (a).

RENT.

I. SERVICE.

- (a) *Reservation of.*
 - (a 1) *By subsequent agreement*, p. 844.
 - (a 2) *Construction of*, p. 844.
- (b) *Apportionment of.*
 - (b 1) *General rule*, p. 844.
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- (c) *Discharge of.*
 - (c 1) *By payment of ground charges*, p. 844.
 - (c 2) *By eviction*, p. 844.
- (d) *Of the party entitled to.*
 - (d 1) *Mortgagor or mortgagee*, p. 844.

II. CHARGE.

- (a) *Apportionment of*, p. 844.

III. ACTION FOR.

- (a) *Pleadings in.*
 - (a 1) *Plea in debt of *riens en arriere**, p. 844.

I. SERVICE.

- (a) *Reservation of.*

- (a 1) *By subsequent agreement.*

A subsequent agreement may, by relation, operate to make a reservation of rent from the beginning. *M. Latch v. Tate*, Cowp. 781.

- (a 2) *Construction of.*

Where the reservation is *monthly* of a portion of the produce, or its value, at the lessor's option, to be made up to 600*l.* *per annum*, if it fell short of that *annual* sum; the lessor having elected the money payment, is entitled to receive each month 50*l.* and the excess, if any, above 600*l.* at the end of the year. *Buckley v. Kenyon*, 10 East, 139.

- (b) *Apportionment of.*
 - (b 1) *General rule.*

Rent service in its nature admits of being apportioned. *Doe*, ex dem. *Vaughan*, v. *Mayler*, 2 M. & S. 276.

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- (b 2) *On eviction.*

As against an assignee of the premises demised, an eviction of part is only a suspension of the rent, *pro tanto*, even in an action of covenant; as against the lessee it is a suspension of the whole rent. *Stevenson v. Lombard*, 2 East, 595.

- (c) *Discharge of.*

- (c 1) *By payment of ground charges.*

To an avowry for rent, the plaintiff in replevin may plead payment of an annuity, secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain. *Taylor v. Zamira*, 2 Mars. 220; 6 Taunt. 524.

- (c 2) *By eviction.*

An estoppel does not exclude the plea of eviction. *Parker v. Manning*, 7 T. R. 537.

- (d) *Of the party entitled to.*

- (d 1) *Mortgagor or mortgagee.*

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. *Moss v. Gallimore*, Dougl. 279.

II. CHARGE.

- (a) *Apportionment of.*

If a rent-charge is granted out of lands, parcel of which lands the grantor has no right to, there can be no apportionment; — as if parcel be demisable under a power, and the power be not pursued; so that the rent is avoided in toto. *Doe*, ex dem. *Vaughan*, v. *Mayler*, 2 M. & S. 276.

III. ACTION FOR.

- (a) *Pleadings in.*

- (a 1) *Plea in debt of *riens en arriere*.*

Riens in arrear is a good plea in debt for rent. *Warner v. Theobald*, Cowp. 588.

REPLEVIN.

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I. OF THE RIGHT TO REPLEVIN.

(a) *After appraisement, and before sale.*

Where goods are distrained, and at the end of five days appraised, but not sold, the act of appraisement does not take away the plaintiff's right to replevin them. *Jacob v. King*, 1 Marsh. 135; 5 Taunt. 451.

(b) *In the case of a distress under a highway act.*

The writ of replevin is not taken away by the Highway Act 13 Geo. III, c. 78, for a distress made under its provisions. *Fenton v. Boyle*, 2 N. R. 399.

(c) *In the case of a distress, by commissioners of sewers.*

It seems that goods taken under a warrant of distress on a decree of the Court of Sewers, are repleviable as another distress; and by the sheriff or his deputy. But, however this be, if actually replevied and the replevin removed here, the court will not interfere in a summary way, but leave the plaintiff to his plea. *Pritchard v. Stephens*, 6 T. R. 522.

II. OF THE PLEADINGS IN REPLEVIN.

(a) *Of the declaration.*

(a 1) *Title of.*

Where the replevin is removed by *recordari*, the declaration must be entitled either of the term in which the writ is returnable, or of that in which it is delivered; if entitled of an intermediate term, judgment signed for want of a plea, will,

on application made in due time, be set aside. *Topping v. Fuge*, 5 Taunt. 771.

(a 2) *Averment of place.*

Since it may be out of the plaintiff's power to ascertain in what place the chattels were first taken, he is allowed to declare that they were seized in any place wherein they have been discovered in the defendant's possession. And if the taking there would not have been justifiable, the defendant may shew where he took them, and that he had them in the place, &c. in his way to the pound. *Walton v. Kersop*, 2 Wils. 354; *Abercrombie v. Parkhurst*, 2 B. & P. 480.

(a 3) *Description of the property.*

In a declaration in replevin, for taking goods, the description, number, and value of them must be stated with certainty. *Pope v. Tillman*, 1 Moore, 386.

(b) *Of the avowry.*

(b 1) *Avowry for rent,—avowry of its continuing due.*

It is not necessary in an avowry or cognizance, to aver that the rent *still* remains due. *Clarke v. Davies*, 2 Marshall, 386; 7 Taunt. 72.

(b 2) *Avowry for rent,—general avowry whether allowable for an increase in the nature of a penalty.*

A general avowry under st. 11 Geo. II, c. 19, may be made for increased rent made payable for land broken up during a certain period of the term. *Roulston v. Clarke*, 2 H. B. 563.

(c) *Of the cognizance.*

(c 1) *Averment that the party distrained as bailiff.*

If A. and B. sue on a replevin bond as the sheriff's assignees, and state that they distrained for rent due to A, it is sufficient, without stating that B. distrained *as bailiff* to A. By A, joining in the distress, it sufficiently appears in what character B. distrained. *Philips v. Price*, 3 M. & S. 180.

(d) *Plea in justification.*

It seems that a plea in replevin, justifying the taking goods damage feasant, on a common claimed in right of *possession*, without praying a return, is bad. *Hawkins v. Eckles*, 2 B. & P. 359.

(e) *Plea to avowry.*

(e 1) *To an avowry for rent founded on possession.*

Where an avowry for rent-service is general on possession, a plea traversing the seisin of any specific estate, is bad. *Bulpit v. Clarke*, 1 N. R. 56.

(e 2) *Nil habuit in tenementis.*

Nil habuit in tenementis, is a bad plea to a general avowry under 11 Geo. II, c. 19. *Syllivan v. Stradling*, 2 Wils. 108.

(e 3) *To an avowry damage feasant.*

A plea in bar to an avowry damage feasant, claiming that the *locus in quo* be laid open on or before a particular day, and thence for such a specific time and upwards, and that the cattle were upon the land during the time when it ought to have laid open as aforesaid, is, even after verdict, bad for uncertainty. *Da Costa v. Clarke*, 2 B. & P. 257.

(e 4) *Eviction.*

In replevin upon a distress for rent, plea in bar that defendant pulled down a summer-house whereby the plaintiff was deprived of the use thereof, without saying that he was expelled, or put out of the same, is insufficient. *Hunt v. Cope*, 1 Cowp. 242.

(e 5) *Set-off.*

There cannot be a set-off to an avowry for rent. *Sapsford v. Fletcher*, 4 T. R. 511; *Graham v. Fraine*, 1d. 512, n. (a); *Laycock v. Tuffnell*, *Ibid*.

(e 6) *Departure in.*

If in replevin for goods and chattels, to wit (*inter alia*) a lime-kiln, the plaintiff to an avowry as a distress, plead that the kiln was affixed to the freehold, it is a departure. *Niblet v. Smith*, 4 T. R. 505.

(e 7) *Inconsistency of double pleas in.*

The plaintiff in replevin, may plead in bar to the defendant's avowry or cognizance, that he did not hold as tenant with a plea of infancy. *Wilson v. Ames*, 1 Mars. 74; 5 Taunt. 340.

(f) *Demurrer,—form of.*

A demurrer to a declaration in replevin, without adding a suggestion for a return,

is no discontinuance. *Serries v. Dodd*, 2 N. R. 405.

III. OF THE PRACTICE IN REPLEVIN.

(a) *Of the rule to declare,—service of.*

The rule to declare in replevin, may be served at any time before it expires. *Edwards v. Dunch*, 11 East, 183.

(b) *Of the rule for time to declare.*

The practice on a rule for time to declare in replevin, is the same as in other actions. *Craven v. Lady Vavasour*, 5 Taunt. 35.

(c) *Of imparlance.*

Where the writ removing a replevin, is returnable the first return of a term, and the plaintiff does not declare until after its expiration, though from the defendant not having appeared, the defendant is entitled to an imparlance. *Thompson v. Jordan*, 2 B. & P. 137.

(d) *Of the notice of inquiry.*

Where judgment is given on demurrer for the avowant in replevin, fifteen days notice of executing the writ of inquiry should be given to the plaintiff, as in case of nonsuit, on 17 Car. II, c. 7. *Burton v. Hickey*, 1 Mars. 444; 6 Taunt. 57.

(e) *In relation to the assessment of damages.*

1. In replevin, if the jury at the trial omit to assess the defendant his damages under avowry for a poor's rate, a writ of inquiry shall issue. *Dewell v. Marshall*, 3 Wils. 443; 2 Blk. 921.

2. If the jury find for the avowant on issue taken to an avowry for rent, they may award him damages under 21 Hen. VIII, c. 19, s. 3, to which he will be entitled, unless he takes judgment under the st. 17 Car. II, c. 7. *Gamon v. Jones*, 4 T. R. 509.

(f) *Relative to staying proceedings.*

(f 1) *On the application of the plaintiff.*

Proceedings in replevin will only be stayed on payment of costs up to the time of application, though after the distress and before replevin the arrears and costs then incurred were tendered. *Hopkins v. Shrole*, 1 B. & P. 382.

(f 2) *On the application of the defendant.*

Since the avowant in replevin is an

actor, he cannot apply to stay proceedings. *Hodgkinson v. Snibson*, 3 B. & P. 603.

IV. OF THE JUDGMENT IN REPLEVIN.

(a) *De retorno habendo*.

(a 1) *Form of*.

A common law judgment in replevin, *de retorno habendo* after verdict, need not state that the return is to be irrepleviable. *Gamon v. Jones*, 4 T. R. 509.

(b) *As in case of a nonsuit*.

Since a defendant in replevin (*query* if before avowry) is an actor as well as the plaintiff, he, like the plaintiff, may take down the record to trial without a proviso; the plaintiff, therefore, can never be guilty of laches in not going to trial, so that there can be no judgment as in case of a nonsuit. *Eggleston v. Smart*, 1 Blk. 375; *Jones v. Concoman*, 3 T. R. 661. See 5 T. R. 400.

(c) *Of vacating it as to part*.

If there be judgment in replevin as well *de retorno habendo*, as that the avowant recover his arrears, &c. though the latter branch be void, from the jury not having pursued the directions of the st. 17 Car. II, c. 7, yet it remains good as to the former, that being a complete judgment at common law. *Gamon v. Jones*, 4 T. R. 509.

V. OF THE COSTS IN REPLEVIN.

(a) *For the plaintiff*.

(a 1) *On double avowries*.

An avowant shall pay costs on the special avowries found against him. *Stone v. Borgh*, Dougl. 709, &c.

(a 2) *On verdict, or judgment, as to part*.

1. *Seem*, that if a plaintiff, *e. gr.* in replevin succeeds upon any one issue, he is entitled to the costs of the verdict. *Dodd v. Jodrell*, 2 T. R. 325.

2. Where in replevin some issues are found for the plaintiff, some for the defendant, and the plaintiff is entitled to judgment, he is entitled to the costs of the trial, deducting the costs of the issues found for the defendant, unless the judge certifies under 4 Ann, c. 16, s. 4, that the plaintiff had probable cause for pleading the matters on which those issues were joined. *Dodd v. Jodrell*, 2 T. R. 325.

3. The defendant, in replevin, avows for rent in arrear, and that the goods had

been clandestinely removed. The plaintiff pleads, 1. Non tenure: 2. No rent in arrear: 3. That the goods were not clandestinely removed. The last issue only was found for the plaintiff. Held, that the defendant was entitled to deduct from the plaintiff's costs, the costs of the two first issues which were found for the defendant. *Cork v. Green*, 1 Mars. 234; 5 Taunt. 594.

(b) *For the defendant*.

(b 1) *Under stat. 11 Geo. II, c. 19*.

1. As well against a third person, the owner of goods distrained, as the lessee himself, the lessor is entitled to double costs, under stat. 11 Geo. II, c. 19. *Finlay v. Seaton*, 1 Taunt. 210.

2. To entitle the defendant to double costs, under stat. 11 Geo. II, c. 19, it is not necessary that the judge should certify, nor that a suggestion should be entered, even where the general issue only is pleaded. *Finlay v. Seaton*, 1 Taunt. 210.

3. It seems that the provision in statute 11 Geo. II, c. 19, giving double costs to an avowant in replevin, only extends to avowries under a tenure; at least it does not extend to an avowry for rent decreed to be paid by commissioners under a canal act, to the owner of land taken for the purposes of the act. *The Company of Proprietors of the Leominster Canal Navigation v. Norris*, 7 T. R. 500; *infra*, pl. 5, in C. B.

4. The stat. 11 Geo. II, c. 19, does not extend to an avowry for a rent-charge. *Bulpit v. Clarke*, 1 N. R. 56.

5. Where, by a Canal Act, the company were authorized to take certain lands for the purposes of the act, on making certain payments, either by annual rents or sums in gross; and the persons from whom the land was to be taken were empowered to distrain the goods of the company, even off the premises, in case of non-payment of such sums; an avowant stating a distress under this act of parliament, was holden not to be entitled on obtaining a verdict to double costs, under the stat. 11 Geo. II, c. 19. *Leominster Canal Company v. Cowell*, 1 B. & P. 213; *supra*, pl. 3, in K. B.

(b 2) *For a co-defendant acquitted*.

One of two defendants in replevin cannot have his costs upon acquittal. *Ingle v. Wordsworth*, 3 Burr. 1284; 1 Blk. 355.

VI. OF THE PLEDGES IN.

(a) *Sufficiency of, how determined.*

It is sufficient for the sheriff, in taking sureties on a replevin bond, that they are apparently responsible; he is not obliged to inquire into their actual sufficiency. *Hindal v. Blades*, 1 Mars. 27; 5 Taunt. 225.

(b) *Liability for the insufficiency of.*

(b 1) *Who are liable for.*

The high-sheriff, under-sheriff, and replevin clerk, who is their deputy, are all answerable to the defendant in replevin for the sufficiency of the pledges *de retorno habendo*. *Richards v. Acton*, 2 Blk. 1220.

(b 2) *Extent of the liability.*

1. The liability of an officer for not taking sufficient pledges in replevin, is limited to the value of the distress. *Gea v. Letchbridge*, 4 T. R. 433; *Wilkinson v. Macauley*, Id. 435, n. (d).

2. The sheriff is liable for taking insufficient pledges in replevin to the full amount of the damages sustained, notwithstanding they exceed the penalty of the bond. *Concannon v. Letchbridge*, 2 H. B. 36.

3. The extent to which the sheriff is liable to render damages in case, for taking insufficient pledges in distresses for rent, is, not exceeding the penalty in the bond. *Evans v. Brander*, 2 H. B. 547.

(c) *Action for the insufficiency of.*

(c 1) *Whether maintainable by the party making cognizance.*

The person who has made cognizance, there being no avowant, should sue for the taking insufficient pledges, or none in replevin. And it seems in exclusion of him in whose right he acknowledges. *Page v. Eamer*, 1 B. & P. 378.

VII. OF THE REPLEVIN BOND. (And see *supra*, VI.)

(a) *Whether available when executed by a single surety.*

Though a replevin bond be executed by one of the sureties only, it is nevertheless available by the sheriff against such surety. *Austen v. Hayward*, 2 Mars. 358; 7 Taunt. 22.

(b) *Of the extent of the liability thereon.*

1. Separate obligors in the same bond are together liable only to the amount

of the penalty; thus, sureties in a replevin bond. *Hefford v. Alger*, 1 Taunt. 218.

2. *Semble*, that if a sheriff take a replevin bond in one surety, and upon judgment in the replevin suit for a return, the return fail to be made, the sheriff cannot recover against the surety more than a moiety of what the person distraining establishes to be due for rent in the replevin suit, and of the costs of the replevin suit, though the sheriff pay larger damages in an action against him for taking insufficient pledges. *Austen v. Howard*, 7 Taunt. 327; 1 Moore, 68.

(c) *On the assignment of.*

(c 1) *Of the right to.*

A replevin bond is assignable, though the defendant did not avow or make cognizance, provided it appear that he would have done so had he not been prevented by the plaintiff,—as by his neglect to go on with the suit. *Dias v. Freeman*, 5 T. R. 195.

(c 2) *To the avowant alone.*

A replevin bond may be assigned to the avowant alone, who may sue thereon, without the party making cognizance. *Archer v. Dudley*, 1 B. & P. 381, n.

(c 3) *To the avowant and bailiff jointly.*

A replevin bond may be assigned to the avowant, and the party making cognizance, who may join in a suit thereon. The judgment in the replevin suit is, that both shall have a return of the goods; both then are legally interested in that by which a compensation for the loss of them is secured. *Phillips v. Price*, 3 M. & S. 180.

(d) *How forfeited.*

1. A replevin bond is forfeited, and assignable, if the plaintiff neglect to appear and prosecute according to the condition. *Dias v. Freeman*, 5 T. R. 195.

2. Where a replevin is removed, the bond is forfeited by a neglect to prosecute in the court above. *Gwillim v. Hollbrook*, 1 B. & P. 410.

3. A defendant in replevin is not entitled to an assignment of the replevin bond, on the plaintiff's neglecting to declare at the next county court, if he himself has not then appeared to the summons. And if he obtain an assignment, and bring an action, the court will stay

the proceedings (on an affidavit being made that a writ of *recordari facias loquelam* has been sued out) without payment of the costs by the defendant, which will be ordered to abide the event of the proceedings on the *re. fa. lo. Seal v. Phillips*, 3 Price, 17.

(e) *How discharged.*

(e 1) *By delay or time given.*

1. Even admitting that a delay by the avowant, in issuing a writ *de retorno habendo*, and consequent loss of an opportunity to execute it, will discharge the sureties in the replevin bond; they waive their right by a payment under it. *Heford v. Alger*, 1 Taunt. 218.

2. Sureties on a replevin bond are not discharged by time being given to the plaintiff in replevin. *Moore v. Bowmaker*, 2 Mars. 81; 6 Taunt. 379.

(f) *Of the action thereon.*

(f 1) *In what court brought.*

An action on a replevin bond may be brought in the superior courts, though the replevin had not been removed from the court below. *Dias v. Freeman*, 5 T.R. 195.

(f 2) *Defence to.*

In an action by the assignee of a replevin bond against the surety, the declaration alleges, that a return of the goods was adjudged, but that S, the plaintiff in replevin, did not make return. The defendant pleads,—1. That the judgment was obtained by the plaintiff, by fraud in collusion with S:—2. That before judgment obtained, all matters in difference between the plaintiff and S. were referred to arbitration, pending which, the proceedings were stayed. Held, that the *first* plea, not stating that the judgment was obtained for the purpose of defrauding the sureties, was no answer to the action;—and that the *second* plea was bad, since the reference was as much for the benefit of the sureties as of the principal, and therefore no prejudice could arise to them from the delay. *Moore v. Bowmaker*, 2 Mars. 392; 7 Taunt. 97.

(f 3) *When premature, how invalidated.*

Where the suit upon a replevin bond is premature, the court will not interfere upon motion, but will leave the defendant to his plea. *Anon.* 5 Taunt. 776.

(g) *Of the pleadings thereon.*

(g 1) *The declaration.*

1. The declaration on a replevin bond need not shew in what the goods distrained consisted; such form not being usual. *Phillips v. Price*, 3 M. & S. 180.

2. A declaration on a replevin bond, assigning for breach, in the words of the condition, that the defendant did not prosecute his suit with effect, and hath not made a return, is not only not objectionable for duplicity, but would have been defective had it not negatived both branches of the condition; for if the party make a return, he need not prosecute his suit with effect; if he prosecute his suit with effect, he need not make a return. *Phillips v. Price*, 3 M. & S. 180.

3. If the declaration on a replevin bond state that the bond was conditioned for prosecuting the suit for taking the goods "in the condition mentioned," (not "distrained") and making return thereof, it sufficiently appears that the condition was for returning the goods distrained. The goods mentioned in the condition must be the goods replevied; and those were the goods distrained. *Phillips v. Price*, 3 M. & S. 180.

4. As against one who has instituted a proceeding in a court of justice, its jurisdiction, and the regularity of its proceedings, are *prima facie* to be intended, and therefore need not be averred in pleading. If the proceedings were irregular, or the court had not jurisdiction, it must be shewn on his part. In an action on a replevin bond, it was objected, that it was not shewn that the officer before whom the replevin was had, and who was the mayor of the city of Canterbury, had authority to grant the replevin; that the replevin had been granted in court, and so that the bond was well taken and assigned. The facts were, that the person for whom the defendant became surety in the bond, and in whose shoes, therefore, he must be considered as placed, was the owner of the goods distrained, and had therefore instituted the replevin suit. Held, that the declaration was sufficient, and that it was for the defendant to plead that the court had no jurisdiction, or that the replevin was granted out of court. *Wilson v. Hobday*, 4 M. & S. 120.

(g 2) *The plea,—pendency of suit.*

A plea to an action on a replevin bond,

conditioned to prosecute the replevin suit with effect, that the suit is still pending, is good, without shewing what stage it had reached. *Brackenbury v. Pell*, 12 East, 585.

(g 3) *The replication,—that the suit has terminated.*

A replication to a plea in an action on a replevin bond, that the suit is not pending, as alleged, in that the defendant wholly abandoned it, is insufficient, without shewing how it was terminated. *Brackenbury v. Pell*, 12 East, 585.

(h) *Of the writ of inquiry thereon.*

(h 1) *Whether necessary.*

In an action on a replevin bond, for not returning goods distrained for rent, final judgment for the amount of the goods, as valued in the bond, may be signed, and execution sued thereon without a writ of inquiry. The end of such writ would be to ascertain the value of the goods; but that has already been ascertained by the appraisement before the replevin officer, and admitted by the defendant executing the bond. *Middleton v. Bryan*, 3 M. & S. 155.

VIII. ON THE SUMMARY JURISDICTION OVER THE REPLEVIN OFFICER.

The court above will not, on account of the insufficiency of the pledges *de retorno habendo*, compel the replevin officer to pay the defendant the costs recovered. *Tesseyman v. Gildart*, 1 N. R. 292.

RESCUE.

I. WHEN AN EXCUSE FOR NOT EXECUTING PROCESS.

(a) *Whether on a removal by habeas corpus*, p. 851.

II. ON THE ATTACHMENT FOR.

(a) *Proceedings thereon*, p. 851.

I. WHEN AN EXCUSE FOR NOT EXECUTING PROCESS.

(a) *Whether on a removal by habeas corpus.*

A rescue is no excuse for a gaol-keeper bringing up a prisoner by *habeas corpus*. *O'Neil v. Marson*, 5 Burr. 2812.

II. ON THE ATTACHMENT FOR.

(a) *Proceedings thereon.*

1. A defendant brought up on an attachment for a rescue, must answer interrogatories, if exhibited, though he admit the facts charged in the affidavits. *Rex v. Horsley*, 5 T. R. 362.

2. On an attachment for a rescue, defendant may be fined *instantly*. *Rex v. Elkins*, 4 Burr. 2129; 1 Blk. 640.

RESURRECTION-MEN.

DISINTERMENT, WHETHER AN INDICTABLE OFFENCE.

The disinterment of dead bodies, though for dissection, is an indictable offence, being *contra bonos mores*. *Rex v. Lynn*, 2 T. R. 733.

REVENUE.

I. RELATIVE TO EXPORTATION.

(a) *Right of seizure on a fraudulent loading*, p. 852.

II. ON ACTIONS RELATIVE TO.

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(a) *Their privileges.*

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(b 1) *To an action for an overpayment paid over*, p. 852.

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(c 1) *Removal of*, p. 852.

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(e) *Liability of the hundred, when killed*, p. 852.

IV. OF GOVERNMENT AGENTS.

(a) *Their privilege to charge a profit*, p. 852.

I. RELATIVE TO EXPORTATION.

(a) *Right of seizure on a fraudulent loading.*

Goods shipped as for exportation, but with the intention of re-landing contrary to law, are liable to seizure, though on board. *Wilson v. Saunders*, 1 B. & P. 267.

II. OF ACTIONS RELATIVE TO.

(a) *Removal of.*(a 1) *Right to.*

The regulations for preserving the revenue are properly cognisable in the Exchequer, and any action relating to them may be removed into the Exchequer. *Cawthorne v. Campbell*, 1 Anst. 220.

(a 2) *Legal effect of.*

The removal of actions in which the revenue is concerned, operates by way of injunction. *Cawthorne v. Campbell*, 1 Anst. 205.

III. RELATIVE TO THE OFFICERS OF.

(a) *Their privileges.*(a 1) *Of being sued in the Exchequer.*

The officers of revenue have not any privilege of being sued in the court of Exchequer, *comme semble*. *Cawthorne v. Campbell*, 1 Anst. 217.

(b) *Their liabilities.*(b 1) *To an action for an over-payment paid over.*

Money had and received will not lie against a revenue officer for an over-payment which he has paid over. *Whitbread v. Brooksbank*, Cowp. 69.

(c) *Of actions against.*(c 1) *Removal of.*

1. An action of trespass against revenue officers, for their conduct in the execution of their office, may be removed from the other courts of law into the Exchequer office of pleas. *Anon.* 1 Anst. 205.

2. The Exchequer will remove into its own court, proceedings commenced against a revenue officer in the courts of Great Sessions in Wales, for acts done in execution of his duty. *In re Kingman*, 1 Price, 206.

(d) *Duties and liabilities of their executors.*

The executor of a deputy quarter-master general, is compellable to account before the commissioners for auditing public accounts, though no *insuper* was set, nor was the testator put in charge during his life; and though the account, in which the *insuper* appeared, was not declared till seven years after his decease. *Rex v. Incedon*, Wightw. 369.

(e) *Liability of the hundred, when killed.*

The party is killed, within the meaning of the statute, 19 Geo. II, c. 34, s. 6, in that place in which the shot was fired, or other act done which produced the death. *Grosvenor v. Inhabitants of the Parish of St. Augustine in Kent*, 12 East, 244.

IV. OF GOVERNMENT AGENTS.

(a) *Their privilege to charge a profit.*

Where a person receives commission-money as an agent, he shall not be allowed to charge government any more than the sum actually paid for the article furnished. *The Attorney-general v. Cockrane*, Wightw. 10.

REVERSIONER.

RIGHTS OF.

(a) *To sue for an injury to the inheritance.*

A reversioner may sue for an injury depreciating the value of the inheritance. *Jesser v. Gifford*, 4 Burr. 2141.

REWARD,

OFFERED FOR THE RECOVERY OF PROPERTY.

(a) *Who entitled to.*

One who receives a reward, offered for a discovery which he was enabled to make, in consequence of another having communicated to him her suspicions, as she stated, for his own benefit, is not liable to her for any part of it. *Fallick v. Barber*, 1 M. & S. 108.

RIGHT, WRIT OF.

I. BY WHOM ENFORCEABLE;

(a) *In relation to seizure, p. 843.*

II. COURSE OF PROCEEDING IN.

- (a) *Inflexible nature of the course prescribed*, p. 853.

III. DECLARATION IN.

- (a) *Averment of seisin*, p. 853.
 (b) *Statement of the descent*, p. 853.

IV. OF THE SUMMONS IN.

- (a) *Of inserting the nisi prius clause therein*, p. 853.
 (b) *Of quashing the summons*, p. 853.

V. OF THE EVIDENCE IN.

- (a) *In a miscellaneous case*, p. 853.

VI. OF THE COSTS IN.

- (a) *Under the statute for judgment, as in case of nonsuit*, p. 853.

VII. OF NEW TRIALS IN, p. 853.

VIII. OF AMENDMENTS IN, p. 854.

IX. OF DISCONTINUING THE WRIT, p. 854.

I. BY WHOM MAINTAINABLE.

- (a) *In relation to seisin.*

To maintain a writ of right, the demandant must shew an actual seisin, either in himself or his ancestor, by taking the esplees or profits of the land. *Dally v. King*, 1 Hen. Bl. 1.

II. COURSE OF PROCEEDING IN.

- (a) *Inflexible nature of the course prescribed.*

The mode of proceeding in a writ of right, cannot be changed, even with consent. *Galton v. Harcey*, 1 B. & B. 192.

III. DECLARATION IN.

- (a) *Averment of seisin.*

In a writ of right, it is necessary to state in the count, that the ancestor from whom the demandant derives title, was seized of the premises in right, as well as in his demesne as of fee. *Dowland v. Slade*, 5 East, 272; 1 Smith, 543; 2 B. & P. 570.

- (b) *Statement of the descent.*

1. If, in counting in a writ of right, one through whom title is derived, is improperly stated to be heir to her brother,

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who, it appears by the record, had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister, as heir to her brother, is fatal. *Slade v. Dowland*, 2 B. & P. 571; 5 East, 272; 1 Smith, 543.

2. In stating the descent in the count of a writ of right to several as nieces and co-heirs, the manner in which they are nieces must be shewn. *Dumday v. Hughes*, 3 B. & P. 453.

IV. OF THE SUMMONS IN.

- (a) *Of inserting the nisi prius clause therein.*

The nisi prius clause may be inserted in the summons, in a writ of right, requiring the four knights to appear and make election of the grand assize. And, if from the omission by the demandant, they are forced to come up to Westminster, the court will not compel them to be sworn, unless he undertakes to pay their expenses; but not the expenses of the sheriff. *Pearson v. Maynard*, 1 Taunt. 415.

- (b) *Of quashing the summons.*

The court will not assist the demandant in a writ of right; and therefore will not allow him to quash a writ of summons, which has been irregularly executed. *Adams v. Radway*, 1 Mars. 602.

V. OF THE EVIDENCE IN.

- (a) *In a miscellaneous case.*

In a writ of right, forty years undisturbed possession is sufficient to rebut presumptive evidence of a seisin in fee, in the person under whom the demandant claims; or at least from which to presume a conveyance of the premises to the tenant. *Jayne v. Price*, 1 Mars. 68; 5 Taunt. 326.

VI. OF THE COSTS IN.

- (a) *Under the statute for judgment, as in case of nonsuit.*

The statute for judgment, as in case of a nonsuit, does not extend to a writ of right, so as to give costs to the tenant. *Newman v. Goodman*, 2 Blk. 1093.

VII. OF NEW TRIALS IN.

No new trial shall be granted in a writ of right, except the verdict be flagrantly wrong. *Tyssen v. Clarke*, 2 Blk. 941.

VIII. OF AMENDMENTS IN.

It is an established rule not to amend the count in a writ of right, unless on very particular grounds. *Dumday v. Hughes*, 3 B. & P. 453; *Charlwood v. Morgan*, 1 N.R. 64; *Baylis v. Manning*, Id. 233.

IX. OF DISCONTINUING THE WRIT.

The demandant in a writ of right, will not be allowed to discontinue. *Charlwood v. Morgan*, 1 N.R. 64; *Maidment v. Jukes*, 2 N. R. 429.

RIOT.

I. ACCESSORIES IN.

- (a) *The degree of their offence*, p. 854.

II. MISCELLANEOUS.

- (a) *Intendment on the death of some defendants, and acquittal of others*, p. 854.

I. ACCESSORIES IN.

- (a) *The degree of their offence*.

Persons present, aiding and abetting, are principals in the second degree, and are within the Riot Act, and ousted of clergy. *Rex v. Royce*, 4 Burr. 2073.

II. MISCELLANEOUS.

- (a) *Intendment on the death of some defendants, and acquittal of others*.

If six are indicted for a riot, two die before trial, two are acquitted, and two are found guilty, the judgment shall not be arrested; for the jury having found two to be guilty of a riot, the court will intend that it must have been together with those two who died, who have never been tried, as otherwise it could not be a riot. *Rex v. Scott*, 3 Burr. 1262; 1 Blk. 291, 350.

RIVER.

I. PROOF THAT A CREEK OR RIVER IS PUBLIC.

- (a) *Presumptive*, p. 854.

II. SOIL OF A PUBLIC RIVER.

- (a) *Property in*, p. 854.

III. BANKS OF A PUBLIC RIVER.

- (a) *Privilege of towing thereon*, p. 854.

IV. PUBLIC RIGHTS CONNECTED WITH,

V. PRIVATE RIGHTS CONNECTED WITH.

- (a) *To the use of the current*, p. 854.
(b) *To drown a neighbour's land,—*
extent of, p. 855.

VI. MISCELLANEOUS.

- (a) *Suits for non-repair*.
(a 1) *Mode of laying the obligation on a corporate body*, p. 855.

I. PROOF THAT A CREEK OR RIVER IS PUBLIC.

- (a) *Presumptive*.

On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. *Miles v. Rose*, 1 Mars. 313; 5 Taunt. 704.

H. SOIL OF A PUBLIC RIVER.

- (a) *Property in*.

The right to the soil of a navigable river belongs, by presumption of law, to the king, not to the owners of the adjoining land. *Rex v. Smith*, Dougl. 441.

III. BANKS OF A PUBLIC RIVER.

- (a) *Privilege of towing thereon*.

The public have no right, without a special custom, to tow upon the banks of antient navigable rivers. *Ball v. Herbert*, 3 T. R. 253.

IV. PUBLIC RIGHTS CONNECTED WITH.

A navigable river is the king's highway, for the use of himself and his subjects. *Loft*. 556.

V. PRIVATE RIGHTS CONNECTED WITH.

- (a) *To the use of the current*.

Semble, that the right to the use of the water of rivers as an easement to lands

contiguous to rivers, is a right of occupancy. The first settler may use as much as he pleases; but, having taken a certain quantity by a channel of a certain dimension, and another person having settled lower down the stream, and taken the use of the water subject to the then definite use of the water by the first settler, the latter is entitled to enjoy as much as he can so occupy in a similarly definite manner; and though the prior settler might have previously used all the water, he cannot then abridge the use of the second settler and occupant. *Bealey v. Shaw*, 2 Smith, 321; 6 East, 208.

(b) *To drown a neighbour's land,—extent of.*

A right to drown a neighbour's lands, during arbitrary periods, is not restricted to the measure of the accustomed exercise thereof. *Alder v. Savile*, 5 Taunt. 454.

VI. MISCELLANEOUS.

(a) *Suits for non-repair.*

(a1) *Mode of laying the obligation on a corporate body.*

Case against a corporation for not repairing a creek in which the tide of the sea ebbed and flowed (but not saying that the creek was a navigable river) as from time immemorial they had been used, is well enough, without laying the obligation to be *ratione tenuræ*, or for other special cause, and without laying special damage. *The Mayor of Lynn v. Turner*, Cowp. 86.

ROCHESTER, CITY OF.

SESSIONS OF.

(a) *Removal of indictments from.*

The Attorney General cannot himself issue a *certiorari* to remove the record of an indictment for murder, found at the sessions for the city of Rochester; but, upon his application to the court of K. B., the court grant it as of course, with an *habeas corpus* to bring up the prisoner. *Rex v. Thomas*, 4 M. & S. 442.

ROGUE AND VAGABOND.

COMMITMENT OF.

(a) *Under 13 & 14 Car. II, p. 855.*

(b) *Under 17 Geo. II, c. 5, p. 855.*

COMMITMENT OF.

(a) *Under 13 & 14 Car. II.*

See Loft. 85.

(b) *Under 17 Geo. II, c. 5.*

A commitment as a rogue and vagabond, under stat. 17 Geo. II, c. 5, can only be in execution, and must therefore be preceded by a conviction; not for safe custody until trial. *Rex v. Rhodes*, 4 T. R. 220.

ROLLS, MASTER OF.

(a) *Leases by*, p. 855.

(b) *See PRACTICE.*

(a) *Leases by.*

The Master of the Rolls may grant as many concurrent leases as he pleases during the last seven years of a former lease, and may, at any time, take a surrender, and renew for twenty-one years. *Wilson v. Sewell*, 4 Burr. 1975; 1 Blk. 617.

SAINT ALBANS, CORPORATION OF.

CHARTER OF.

(a) *Construction of.*

The successors of the modern recorder of St. Alban's, named in the charter of Charles II, have no right to appoint a deputy, the power therein given being confined to himself. *Rex v. The Mayor of St. Albans*, 12 East, 559.

SAINT ANDREW'S, AND SAINT GEORGE'S HOLBORN.

PAVING ACT.

(a) *Rateability of masters in chancery under.*

Masters in chancery are not rateable under the Paving Act 11 Geo. III, c. 22, for their apartments in Southampton

Buildings. *Holford v. Copeland*, 3 B. & P. 129.

SAINT DOMINGO.

NEUTRALITY OF PORTS OF, DURING THE LATE WAR.

During the late war, such ports in St. Domingo as were under the dominion of Christophe, were considered neutral. *Johnson v. Greaves*, 2 Taunt. 344.

SAINT LEONARD'S, SHOREDITCH,

PAVING ACT.

(a) *Appeal under.*

An appeal under st. 8 Geo. III, c. 33, (relative to the paving, &c. of St. Leonard's Shoreditch) may be to the sessions either of London or of Middlesex. *Rex v. The Commissioners of Shoreditch*, 4 T. R. 701.

SAINT MARTIN'S

PAVING ACT.

(a) *Who eligible as a committee-man under.*

A collector of the assessed taxes is not prohibited from acting as a committee-man under 23 Geo. III, c. 90, s. 4, for paving and lighting St. Martin's parish. 1 M. & S. 482.

SAINT NICHOLAS, DEPTFORD.

COLLECTOR.

(a) *Duration of his appointment.*

The statute 27 Geo. II, c. 38, s. 6, authorizes the churchwardens and parsonages, from time to time to remove the collector appointed under its provisions, and appoint another. Sect. 10, provides that certain governors and directors shall be appointed annually, and fixes the days. This circumstance of providing for an annual appointment in the one case, but not in the other, shews that the other appointment was not to be annual. *Curling v. Chalklen*, 3 M. & S. 502.

SAINT NICHOLAS, ROCHESTER.

GUARDIANS OF THE POOR OF.

(a) *Whether a corporation.*

The guardians of the poor of Saint Nicholas, Rochester, are not a corporate body. They are regulated by statute 49 Geo. III, c. 40, (local and personal.) A *mandamus* to the guardians, to restore the clerk and treasurer appointed under that act, does not lie, since he is merely a servant to a body of private individuals. *Rex v. Guardians of the Poor of Saint Nicholas, Rochester*, 4 M. & S. 324.

SALVAGE.

I. WHO ENTITLED TO.

(a) *The lord of the manor, where the ship is not a wreck*, p. 856.

(b) *A passenger*, p. 856.

II. WHO LIABLE FOR.

(a) *General rule*, p. 856.

(b) *Ship-owner or freighter*, p. 857.

III. OF THINGS CONTRIBUTORY TO.

(a) *Freight*, p. 857.

IV. STATUTES RELATIVE TO.

(a) 12 Ann, stat. 2, c. 18, s. 2, p. 857.

I. WHO ENTITLED TO.

(a) *The lord of the manor, where the ship is not a wreck.*

Where a ship cast on shore is not a wreck, the lord of the manor cannot entitle himself to salvage by interposing to secure it, contrary to the owner's express dissent. *Sutton v. Buck*, 2 Taunt. 302.

(b) *By a passenger.*

A passenger who in the hour of danger takes the command of the ship abandoned by the master and part of the crew, and brings her safe into port, and to whom the owner afterwards acknowledges that she was saved by his exertions, is entitled to salvage. *Neuman v. Walters*, 3 B. & P. 612.

II. WHO LIABLE FOR.

(a) *General rule.*

Salvage is a compensation to the salvors.

not merely for the restitution of the property which has been made by them to the prior owners, for that is properly an act of mere justice on their part, but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved; and the persons to contribute to that salvage are the persons who would have borne the loss, had there been no such rescue, and who of course reap the benefit of that rescue. *Cox v. May*, 4 M. & S. 159.

(b) *Ship-owner or freighter.*

A ship is let to freight from London to Lima under a charter-party, at so much per ton per month, payable after the ship shall have reported at the custom-house in London. The outward cargo is delivered, and homeward cargo taken in at Lima, with which she sails, is captured, but recaptured, arrives and reports in London. Certain expenses are incurred in obtaining restitution of the ship and cargo, and salvage decreed to the re-captors. The proceeds of the homeward cargo fall short of the freight due. Question, who is liable for payment of the salvage and the expenses of obtaining restitution; the ship-owner or the freighter, or both; and in what proportions? Held, 1. As to the salvage, that the ship-owner alone was liable, since salvage is due from those alone who are benefited by the re-capture. Here, had there been no re-capture, the freighter would not have been liable for freight, since then the ship could not have reported in London, upon which condition only was it payable; by the recapture he is made liable, and all that he gains thereby are his goods, whose value will not meet the freight, so that he is damnified, and a loser by the re-capture, instead of a gainer:—2. That the freighter alone was liable for so much of the charges as were paid to obtain restitution of the cargo, since he alone was benefited by the restitution. Had the cargo never been restored, the ship-owner would not have suffered, since his freight was payable, not on delivery of the cargo, but on reporting in London; it was therefore immaterial to him if he came home in ballast; but the freighter was benefited, since thereby he acquired a fund wherewith to discharge a portion

of the freight. *Cox v. May*, 4 M. & S. 152.

III. OF THINGS CONTRIBUTORY TO.

(a) *Freight.*

The principle upon which freight contributes in the case of salvage is, that but for the re-capture, for which the salvage is paid, it would have been lost. *Cox v. May*, 4 M. & S. 159.

IV. STATUTES RELATIVE TO.

(a) 12 *Ann*, st. 2, c. 18, s. 2.

The stat. 12 *Ann*, st. 2, c. 18, s. 2, only applies where the salvage is made by the public officers as therein provided, not therefore where made by a third person at the master's request. *Baring v. Day*, 8 East, 57.

SCHOOL.

I. RELATIVE TO THE MASTER OF.

(a) *Qualification of*, p. 857.

(b) *Licensing of*, p. 857.

(c) *Bond of resignation by, validity of*, p. 857.

II. OF THE NOMINATION TO.

(a) *In a particular instance*, p. 858.

I. RELATIVE TO THE MASTER OF.

(a) *Qualification of.*

To the fitness of the master of a grammar school, learning is as essential as morality and religion; therefore the ordinary may examine a candidate touching his sufficiency in the former as well as the latter. *Rex v. The Archbishop of York*, 6 T. R. 490.

(b) *Licensing of.*

By the canon law, as recognized in England, the licensing of masters to grammar schools belongs to the ordinary. *Rex v. The Archbishop of York*, 6 T. R. 490.

(c) *Bond of resignation by, validity of.*

A general resignation bond to the patron by the master of an antient public school, though having a freehold in his office, is unimpeachable at law. If any corrupt purpose is intended, equity will interfere.

Legh v. Lewis, 1 East, 391; S. C. on error, but no opinion given, 3 B. & P. 231.

II. OF THE NOMINATION TO.

(a) *In a particular instance.*

The nomination to a school is vested in the vicar and churchwardens of X; to devolve, on their neglecting to nominate, to the corporation of Y; and on their neglecting, to return to the vicar and churchwardens. Held, that the nomination by the vicar and a majority of the churchwardens, was good. *Withnell v. Gartham*, 6 T. R. 388.

SCIRE FACIAS.

I. PROPERTIES OF.

(a) *Whether an action*, p. 858.

II. OF THE JUDGMENT ON.

(a) *Motion in arrest of, when made*, p. 858.

III. OF THE COSTS IN.

(a) *After judgment by default, on bond, and assessment of damages*, p. 858.

(b) *In scire facias to repeal a patent*, p. 858.

IV. ON A BOND OR RECOGNIZANCE.

(a) *Against two of three obligors*, p. 858.

(b) *Nonjoinder of parties in, how objected to*, p. 858.

V. TO REVIVE A JUDGMENT.

(a) *When unnecessary*, p. 858.

(b) *Dispensation of, by consent*, p. 859.

(c) *Return to*, p. 859.

(d) *Declaration in,—title of*, p. 859.

VI. AGAINST HEIR AND TERRE-TENANTS.

(a) *Pleas to.*

(a 1) *Nonjoinder of parties*, p. 859.

I. PROPERTIES OF.

(a) *Whether an action.*

A *scire facias* is an action. *Fennor v. Eames*, 1 T. R. 267.

SCIRE FACIAS.

II. OF THE JUDGMENT ON.

(a) *Motion in arrest of, when made.*

A motion cannot be made in arrest of judgment on a *scire facias* after the first four days of term. *Rex v. M'Leod*, 3 Price, 203.

III. OF THE COSTS IN.

(a) *After judgment by default, on bond and assessment of damages.*

Although the third section of 8 and 9 W. III, c. 11, gives costs in *scire facias*, after plea or demurrer only, yet after a judgment by default in an action within the 8th section of the stat. and a *scire facias* issued thereon suggesting breaches, and a consequent assessment of damages, conformably to the act, the plaintiff is entitled to costs under the latter part of the last-mentioned clause, by which a stay of proceedings is directed on payment of future damages, costs and charges. *Brooks v. Booth*, 11 East, 387.

(b) *In scire facias to repeal a patent.*

The provision in the stat. 8 & 9 W. III, c. 11, s. 3, which gives costs in all suits upon a writ of *scire facias*, does not extend to a *scire facias* prosecuted in name of the king to repeal a patent. *Rex v. Miles*, 7 T. R. 367.

IV. ON A BOND OR RECOGNIZANCE.

(a) *Against two of three obligors.*

A *sci. fa.* against two, "that they severally be and appear to shew cause," &c. on a bond to the crown executed by three, is bad. *Rex v. Chapman*, 3 Anst. 811.

(b) *Nonjoinder of parties in, how objected to.*

Scire facias against two on a joint and several recognizance of four to the crown, without averring the others to be dead. This may be objected to without a plea in abatement. *Aliter*, on a bond. *Rex v. Young*, 2 Anst. 443.

V. TO REVIVE A JUDGMENT.

(a) *When unnecessary.*

Judgment was entered on a warrant of attorney given with a bond to secure an annuity payable quarterly, and the arrears levied. On a second quarter becoming due, a second *fi. fa.* was issued, without reviving the judgment; and held regular. *Scott v. Whalley*, 1 H. B. 297.

SCIRE FACIAS.

TO

SEDUCTION.

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(b) *Dispensation of, by consent.*

One may agree not to insist upon a *sci. fa.* to revive a judgment against him after the year has elapsed; and execution sued out without a *sci. fa.* will then be good. *Howell v. Stratton*, 2 Smith, 66.

(c) *Return to.*

No execution can be sued out on a *sci. fa.* to revive an old judgment, till a *scire feci* is returned, or an affidavit of personal notice to the defendant be produced. *Bagnall v. Gray*, 2 Blk. 1140.

(d) *Declaration in, title of.*

A declaration on a *sci. fa.* to revive a judgment, returnable the last return, may be entitled of the same term generally. *Ward v. Gansell*, 3 Wils. 154; 2 Blk. 735.

VI. AGAINST HEIR AND TERRE-TENANTS.

(a) *Pleas to.*

(a 1) *Nonjoinder of parties.*

A plea to a *scire facias* against the heir and terre-tenants of the recoverer, that there are other terre-tenants not returned, is a dilatory plea within 4 & 5 Ann. c. 16; and requires to be verified by affidavit. *Phelps v. Lewis*, Forrest, 139.

SCOTLAND.

CONSTRUCTION OF THE ACT OF UNION.

(a) *In relation to the privileges of Scotchmen.*

It was not the intention of the Act of Union, that the privileges hitherto peculiar to English dignitaries, should be communicated to the dignitaries of Scotland; but only that Scotchmen should have the same general privileges as subjects with Englishmen. *Jones v. Smart*, 1 T. R. 44.

SECRETARY OF STATE.

I. NATURE OF HIS OFFICE.

(a) *Whether a conservator of the peace, p. 859.*

II. PRIVILEGES OF.

(a) *To arrest and commit, p. 859.*

I. NATURE OF HIS OFFICE.

(a) *Whether a conservator of the peace.*

The Secretary of State is not, as such, a conservator of the peace; nor can he issue a *general* warrant to search for and seize the person and papers. *Entick v. Carrington*, 2 Wils. 275; *Wilkes v. Wood*, Loft. 1.

II. PRIVILEGES OF.

(a) *To arrest and commit.*

1. A secretary of state may arrest and commit for high treason. *Rex v. Deverard*, 7 T. R. 736.

2. *Vide supra*, I.

SECURITIES.

I. DOUBLE.

(a) *Election of, in case of suit, p. 859.*

II. ADDITIONAL.

(a) *Suspension of action by, p. 859.*

I. DOUBLE.

(a) *Election of, in case of suit.*

If a person has two securities, — thus, a mortgage and a bond, he may proceed on both at the same time. *Burnell v. Martin*, Dougl. 417. See MORTGAGE.

II. ADDITIONAL.

(a) *Suspension of action by.*

That the acceptance of an additional security may suspend the right of action on the original debt, it must be given for the whole debt (or composition agreed for in lieu thereof). *Walker v. Seaborne*, 1 Taunt. 526.

SEDUCTION,

ACTION FOR.

(a) *Relation of master and servant, whether essential to, and when subsisting, p. 860.*

(b) *Evidence in,—proof of the relation of master and servant, p. 860.*

(c) *Damages in.*

- (c 1)
- In the case of an adopted child, p. 860.*

(a) *Relation of master and servant, whether essential to, and when subsisting.*

1. To maintain an action *per quod servitium amisit*, seduction for example, the relation of master and servant must subsist between the plaintiff and the party seduced. *Dean v. Peel*, 5 East, 45; 1 Smith, 333. This is made out by proving either an express contract, or acts of service; and the slightest are sufficient; the circumstance that no wages are given, is immaterial. *Bennett v. Allcott*, 2 T. R. 168.

2. The relation of master and servant subsists between a father and his daughter, though she is of age, provided she performs acts of service. *Bennett v. Allcott*, 2 T. R. 166.

3. A parent cannot sue for his daughter's dishonour, when, at the time of her seduction, she was in another's service. *Postlethwaite v. Parkes*, 3 Burr. 1878; *Dean v. Peel*, 5 East, 45; 1 Smith, 333.

(b) *Evidence in,—proof of the relation of master and servant.*

1. In an action for seduction, the relation of master and servant, between the plaintiff and the party seduced, must be established, as by proving acts of service. *Weedon v. Timbrell*, 5 T. R. 360.

2. *Supra*, (a), pl. 1.

(c) *Damages in.*

- (c 1)
- In the case of an adopted child.*

Vindictive damages may be given for seducing an adopted child. *Irwin v. Dearman*, 11 East, 23.

SESSIONS.

I. JURISDICTION OF.

(a) *Over crimes.*

- (a 1)
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- (a 2)
- Over conspiracy, p. 861.*

(b) *To order payments out of the county stock.*

- (b 1)
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 - (a 1) *Whether on a question of fact*, p. 863.
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- (d) *Of sending a case back*, p. 864.
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- (a) *Legal effect of a confirmation by them of the order of their own appointed committee*, p. 864.

I. JURISDICTION OF.

- (a) *Over crimes.*
 - (a 1) *General rule.*

With the exceptions of forgery, *Rex v. Gibbs*, 1 East, 173, and perjury, every offence tending to a breach of the peace, is cognizable by the quarter sessions; therefore the offence of soliciting a servant to rob his master. *Rex v. Higgins*, 2 East, 5.

- (a 2) *Over conspiracy.*

The quarter sessions have jurisdiction over conspiracy. *Rex v. Rispal*, 1 Blk. 368.

- (b) *To order payments out of the county stock.*

- (b 1) *To defray the costs of prosecutions.*

The quarter sessions can only direct the costs of a prosecution to be defrayed out of the county rates, when empowered by statute so to do. *Rex v. The Inhabitants of the West Riding of Yorkshire*, 7 T. R. 377.

- (b 2) *To defray the costs of litigating a fine by the county.*

If the quarter sessions, conceiving that a fine imposed upon the county is illegal, direct that the legality of it be litigated, they may order the expenses of such litigation to be defrayed out of the county stock. *Rex v. Essex*, 4 T. R. 590.

- (c) *Jurisdiction of an adjourned sessions, in relation to an insolvent act.*

Where a statute authorized the justices of peace "at the first or second general quarter session, or general session to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors; held, that the discharge must be at an original sessions, not at the adjournment of one convened before the act. *Brown v. Compton*, 8 T. R. 424.

- (d) *To revise the proceedings of a former sessions.*

A statute, after making the proprietors of certain navigation shares, a corporation with certain funds, directed them to keep an account of their receipts and disbursements, which should every year be examined, stated, corrected, and allowed by the bishop of X, and the county justices of X, at their first general quarter sessions after a certain day, at which time they were to direct a distribution of the surplus profits, if any. The sessions in any year have no authority to revise or correct any errors in the accounts, upon which a balance was struck, and allowed at the sessions in any preceding year. *Rex v. Conservators of River Tone*, 8 T. R. 286.

- (e) *Whether exclusive in questions of fact.*

If the sessions find the fact of fraud generally, the court are bound by the finding. *Rex v. Llanwinio*, 4 T. R. 473.

- (f) *Under 5 Eliz. c. 4, s. 39.*

The quarter sessions may proceed by information on 5 Eliz. c. 4, s. 39. *Farren v. Williams*, Cowp. 369.

- (g) *Under 47 Geo. III, sess. 2, c. 66.*

The statute, 47 Geo. III, sess. 2, c. 66, enacts, that offenders against its provisions shall be committed until the next court of oyer and terminer, great session, or gaol delivery; not saying, "general quarter sessions." Yet the quarter ses-

sions nevertheless have jurisdiction over the offence, since it is a misdemeanour, and he may be indicted, though he were never apprehended or committed at all. *Rex v. Cock*, 4 M. & S. 71.

II. JUDGMENT AND ORDER OF.

(a) *Of adhering to the statutable form.*

Where a statute gives a special authority to the sessions for the compulsive disposal of property, the adjudication of the sessions must follow precisely the provisions of the act. *Rex v. Croke*, Cowp. 30.

(b) *Of amendments in.*

A judgment of the sessions may be amended by them during their continuance. *Rex v. Justices of Leicestershire*, 1 M. & S. 442.

(c) *Whether aided by collateral matters.*

If the sessions make an order, founded upon an indictment, and the order omit to mention facts which are essential to give it validity, the record of the indictment may be referred to, to ascertain whether the facts exist, and so to support the order. As where they award costs to a party prosecuted, without stating in the order that a trial has been had; upon a *certiorari* removing the order into the K. B., that court will direct a *certiorari* to bring up the indictment, and see whether it states that fact. *Rex v. Commerell*, 4 M. & S. 203. Vide *infra*, (f).

(d) *Whether divisible.*

An order of sessions may be good for part, and void for the remainder. *Rex v. Price*, 6 T. R. 147.

(e) *When cognizable by the court of K. B.* (e 1) *Whether where one judgment is entered for another.*

Where one judgment is entered at the sessions for another, the K. B. cannot interfere, unless the mistake is apparent on the record. *Rex v. Justices of Leicestershire*, 1 M. & S. 442.

(f) *How cognizable by the court of K. B.*

1. The court of K. B. will not examine into any thing but what appears on the face of the order of sessions. *Rex v. Atkins*, 4 T. R. 12.

2. Upon the removal of an order of sessions, the court of K. B. merely act upon the case as it appears upon the face

of it, and will not hear affidavits touching matters which passed at the sessions. Thus, upon the removal of an order of sessions allowing overseers' accounts, the court will determine its sufficiency as it appears upon the face of it, and will not hear affidavits shewing that the charges allowed are unreasonable; for first, the sessions are a court having jurisdiction to decide whether they are or are not reasonable; secondly, the time of the court would be absorbed in taking the accounts, and so the greatest inconvenience be the consequence. *Rex v. James*, 2 M. & S. 321. Vide *supra*, (c).

(g) *Proceedings in K. B. relative to.*

(g 1) *Application for a revision of the judgment of K. B. thereon, when made.*

An application to K. B. to revise their judgment on an order of the sessions, unless for a clerical mistake, comes too late in the term subsequent to that in which it was given. *Rex v. Moor Critchell*, 2 East, 222.

III. APPEALS TO.

(a) *The next sessions defined.*

1. Where a statute gives an appeal to a person aggrieved by a judgment or adjudication, to the next sessions; if the proceeding is *ex parte*, those are the next sessions which happen next after the person is actually aggrieved by the proceeding, since before that he can know nothing of it; but where himself is a party to the proceeding, he must appeal to the sessions next after the judgment. *Proser v. Hyde*, 1 T. R. 414.

2. The next sessions, means the next practicable sessions at which an effectual appeal can be lodged. *Rex v. Justices of Dorsetshire*, 15 East, 200; *Rex v. Justices of Sussex*, Id. 206.

3. What is the next possible sessions, must ever remain a question of fact, depending upon the circumstances of each particular case. These cases are instances where the second sessions after the party was aggrieved, was held the next possible sessions. *Rex v. Justices E. R. of Yorkshire*, Dougl. 192; *Rex v. Justices of Flintshire*, 7 T. R. 200; *Rex v. Justices of Surry*, 1 M. & S. 479.

(b) *Entry of, at a subsequent sessions, where a treaty of compromise has gone off.*

Where an appeal is prevented from being heard at the next sessions, by agree-

ment between the parties, in expectation of their difference being settled in another way, the appeal may be entered at the ensuing sessions. *Rex v. Justices of Wilts*, 1 East, 683.

(c) *Adjournment of.*

The power of adjournment can only be exercised by the sessions, on appeals regularly brought before them. *Rex v. Justices of Oxfordshire*, 1 M. & S. 446.

(d) *Of countermanding notice of.*

An appellant may countermand his notice of appeal at any time before the sessions. *Rex v. Abercon*, 5 East, 453.

(e) *Legal effect of.*

(e 1) *Whether the question of jurisdiction is thereby concluded.*

A party, by appealing to the sessions, is not estopped from afterwards disputing their jurisdiction. *Rex v. Lord Radnor*, 8 East, 113.

(f) *Whether the exclusive remedy.*

Where a power of appeal is given to the quarter sessions, and that to be final, no other mode of trial can be admitted; but on refusal to admit the appeal, or want of due publication, the court will relieve. *Anon. Loft*, 184.

IV. OF STATING A CASE BY, TO THE COURT OF K. B.

(a) *When allowable.*

(a 1) *Whether on a question of fact.*

The sessions cannot take the opinion of the court on facts. If, therefore, after stating the evidence adduced, they adjudge that a place is a vill by reputation, the court will not examine into the sufficiency of the conclusion. *Rex v. The Inhabitants of Ronton Abbey*, 2 T. R. 207.

(a 2) *Whether on the trial of an indictment.*

A special case cannot be reserved for the opinion of the court of K. B. on the trial of an indictment at the sessions. *Rex v. Inhabitants of Salop*, 13 East, 95.

(b) *Form of.*

(b 1) *In relation to modes of expression.*

In stating a case, the sessions are not tied up to technical expressions. *Rex v. The Inhabitants of Chertsey*, 2 T. R. 37.

(b 2) *In relation to the statement of matters of fact.*

1. The sessions, in stating a case, should find facts and not evidence. *Rex v. The Inhabitants of Middlezoy*, 2 T. R. 41.

2. The court of K. B. have not jurisdiction to decide a question of fact. Therefore, where the sessions state a case for their opinion, they must themselves find whether certain facts exist; and not by stating the evidence in support of them, leave it to the court to infer their existence. *Rex v. The Inhabitants of Warblinton*, 1 T. R. 247.

3. It is the peculiar jurisdiction of the sessions, on a case reserved, to say whether a particular transaction was fraudulent or not; and if they do not adjudge that it was, the court of K. B. cannot infer it from the facts stated. *Rex v. The Inhabitants of Fillongley*, 1 T. R. 458.

4. The sessions cannot take the opinion of the court of K. B. upon facts, since of these, themselves are exclusively the judges. If, therefore, in a case reserved, they find a fact stating the premises, whence their conclusion is drawn, that the court may determine whether it be just, the court will not discuss its propriety, but will consider the fact as established; as where they find that the landlord, and not his tenant, was intended to be rated, &c. *Rex v. The Inhabitants of Folkestone*, 3 T. R. 505.

5. Whether absence is under a dispensation with service, or a dissolution of the contract, is a conclusion to be drawn by the justices. *Rex v. St. Peter Mancroft*, 8 T. R. 477.

6. The fact of consent to a service with another, should be distinctly found. *Rex v. Shebbear*, 1 East, 73.

7. The sessions must find the fact of fraud, since K. B. cannot infer it from circumstances. *Rex v. Llanbedergoch*, 7 T. R. 105.

8. Upon a question of settlement by being rated, the sessions should set forth as a fact, whether the landlord or tenant is rated. *Rex v. Rainham*, 5 T. R. 240.

9. It is not enough for a case to state that particular inhabitants appeared in possession of stock in trade to specified amounts. The sessions should also state whether this property belonged to the several persons sought to be included in the rate, or if it did, whether or not it

produced profit, or was not liable to incumbrances equal in value to the property itself. *Rex v. Dursley*, 6 T. R. 53; *Rex v. Macdonald*, 12 East, 324.

10. The sessions must find, as a fact, whether a parish can or cannot have the benefit of 43 Eliz. *Rex v. Watson*, 3 Smith, 283; 7 East, 214.

(b 3) *In relation to presumptions.*

1. If a presumption in favour of a settlement can be drawn, it must be drawn by the sessions. The court of K. B. cannot infer it from the circumstances stated in a case for their opinion by the sessions. *Rex v. Inhabitants of Seacroft*, 2 M. & S. 472. *Vide supra*, (b 2); *infra*, (c).

2. Possession of personal property is evidence upon which the sessions ought to conclude that the possessor is the proprietor, unless the contrary is proved. *Rex v. Darlington*, 6 T. R. 468.

(b 4) *Informality in,—whether objectionable.*

If the sessions state a case informally, but in such a manner that the court may give judgment, it will not be sent back. *Rex v. The Inhabitants of Middlezoy*, 2 T. R. 41.

(c) *Proceedings thereon in K. B.*

1. Where the sessions state a case for the opinion of the court, the court will not go into any questions but those upon which the sessions desire their opinion; and will take for granted that every thing requisite has been done, without which it were needless to raise the questions. *Rex v. The Undertakers of the Aire and Calder Navigation*, 2 T. R. 660.

2. If the sessions state a case, and allege as a consequence from the facts stated, and not as a conclusion from other facts not apparent, that a transaction was fraudulent, the court will determine whether or not the inference be just. *Rex v. The Inhabitants of Mursley*, 1 T. R. 694.

3. If the quarter sessions make an order upon the ground of fraud, subject to the opinion of the court, upon a case stated, whence it appears that there are no circumstances to warrant that inference, the court will quash the order. *Rex v. Inhabitants of Wilby*, 2 M. & S. 501.

4. Where the sessions draw a conclusion not warranted by the facts, and make

an order thereon, subject to the opinion of the court of K. B. on the case stated, the court will quash the order. Therefore, where the master of a servant, under a yearly hiring, twenty-eight days before the year, gave up his business, sold his stock, and paid off and discharged the servant, with all his other servants, paying them their full wages, and telling them to go where they liked, and the servant took his wages, left the house and worked with another person with the master's knowledge, during the twenty-eight days; and the sessions, holding this to be only a dispensation or foregoing by the master, of the benefit of actual service for a part of the time, made an order thereon, subject, &c. the court quashed the order; for the facts amounted to a dissolution of the contract, and of the relation of master and servant. *Rex v. Inhabitants of Bray*, 3 M. & S. 20.

(d) *Of sending a case back.*

1. Where the parish officers gave no evidence, respecting the amount of the property rated as tithe-rent and composition, the case was sent back to be re-heard, reconsidered, and re-stated. *Rex v. Topham*, 12 East, 546.

2. Where a sessions case is sent down to be re-stated, and upon its being returned amended, the parish removing it abandon the prosecution, they are not liable to costs. *Secus*, where they dispute the amended order. *Rex v. Edgeworth*, 4 T. R. 218.

(e) *Conclusive nature of.*

Where the sessions stated in their case, that the pauper was legally appointed governor of the workhouse in the parish of I, at an annual salary, and that "the said office of governor is a public annual office;" held, that all discussion how far it was within the act, was thereby precluded. *Rex v. Ilminster*, 1 East, 83.

V. MISCELLANEOUS.

(a) *Legal effect of a confirmation by them, of the order of their own appointed committee.*

If the sessions confirm the act of a committee nominated by them, it becomes their own. *Rex v. The Justices of Glamorganshire*, 5 T. R. 279.

SET-OFF.

I. WHEN ALLOWABLE.

- (a) *Whether in the case of a ready money bargain*, p. 865.
- (b) *Whether of a verdict*, p. 865.
- (c) *Whether of a judgment pending error*, p. 865.
- (d) *Whether of unliquidated damages*.
 - (d 1) *General rule*, p. 865.
 - (d 2) *In the case of a policy*, p. 865.
 - (d 3) *In the case of a covenant*, p. 865.
- (e) *Whether of demands in a different right*, p. 865.
- (f) *Whether of one judgment, or the costs of one proceeding against another*.
 - (f 1) *General rules*, p. 866.
 - (f 2) *Where the plaintiff is in execution*, p. 866.
 - (f 3) *In miscellaneous cases*, p. 866.
- (g) *In discharge of an execution*, p. 866.
- (h) *By payment into court*, p. 866.

II. WHEN UNNECESSARY.

- (a) *Where the demand is to be taken as part payment*, p. 866.

III. OF THE PLEA OF SET-OFF.

- (a) *In relation to a bond*, p. 867.
- (b) *Divisibility of,—in relation to a demurrer*, p. 867.

IV. OF THE REPLICATION TO THE PLEA OF SET-OFF.

- (a) *Where the set-off comprizes a simple and a debt of record*, p. 867.

V. ON THE WAIVER OF THE RIGHT OF.

- (a) *Whether a discharge of the demand*, p. 867.

VI. IN CRIMINAL CASES.

- (a) *Of a fine estreated, against the expenses of a prosecution*, p. 867.

I. WHEN ALLOWABLE.

- (a) *Whether in the case of a ready money bargain*.

If a creditor purchase goods of his debtor, to be paid for in ready money, the creditor may nevertheless set off his demand against an action for the price. *Eland v. Karr*, 1 East, 375, *accord.*; 2 Esp. C. 626; but see 16 East, 138.

- (b) *Whether of a verdict*.

A verdict against a plaintiff, in a prior action, may be set off against a present demand. *Baskerville v. Browne*, 2 Burr. 1229.

- (c) *Whether of a judgment pending error*.

A judgment may be pleaded by way of set-off, pending a writ of error. *Evans v. Prosser*, 3 T. R. 186.

- (d) *Whether of unliquidated damages*.

- (d 1) *General rule*.

Unliquidated damages are not the subject of a set-off. *Weigall v. Waters*, 6 T. R. 488.

- (d 2) *In the case of a policy*.

Mutual credit, *ex vi termini*, imports unliquidated damages, as contradistinguished from mutual debts; therefore, unless in the case of bankruptcy, unliquidated losses on policies of insurance cannot be set off. *Cumming v. Forester*, 1 M. & S. 494.

- (d 3) *In the case of a covenant*.

In covenant, unliquidated damages arising from the breach of other covenants by the plaintiff, cannot be set off. *Howlet v. Strickland*, Cowp. 56.

- (e) *Whether of demands in a different right*.

1. A debt due from the plaintiff and another, jointly and severally, may be set-off. *Secus*, if jointly only. *Fletcher v. Dyche*, 2 T. R. 32.

2. The debt and costs in a joint action by A, against B. and C, may be set off against those recovered in an action by B. and C. against A, notwithstanding A. has a separate demand against C. *Glaister v. Hewer*, 8 T. R. 69. *Vide infra*, (f 1), pl. 2.

(f) *Whether of one judgment, or the costs of one proceeding against another.*(f 1) *General rules.*

1. The costs of one judgment may be set off against the debt and costs of another. *Thrustout, d. Barne, v. Crafter*, 2 Blk. 826.

2. The court will permit the costs of one action to be set off against those of another (even where the one is a several the other a joint action) the party applying, undertaking to satisfy the attorney's lien for his bill in the cause, to the costs of which he is chargeable, and to enter a *remittitur* in that in which he is entitled to costs. *Mitchell v. Oldfield*, 4 T. R. 123; *Morland v. Lashley*, 2 H. B. 441, n. *Vide supra*, (e).

3. *Samble*, the defendant cannot set off the debt and costs against a judgment recovered against the plaintiff, if the plaintiff has still another demand against him. *Gleister v. Hewer*, 8 T. R. 69.

4. It seems that the court will not permit one judgment to be set off against another on motion, unless the same might be done by plea in an action thereon. *Doe v. Darnton*, 3 East, 149.

5. The court will not allow one judgment to be set off against another, on motion, where the interests of third persons have intervened; not therefore a judgment recovered by A. from B, when solvent, against one recovered from A, by the assignees of B, since his insolvency. *Doe v. Darnton*, 3 East, 149.

(f 2) *Where the plaintiff is in execution.*

The defendant may set off a judgment recovered from the plaintiff against the demand for which he is suing and the costs incurred, though the plaintiff is in execution on the judgment, since that is no satisfaction. *Peacock v. Jeffery*, 1 Taunt. 426; *Simpson v. Hanley*, 1 M. & S. 696.

(f 3) *In miscellaneous cases.*

1. Where several actions were brought upon two policies of insurance, underwritten by the same parties, and the actions on each were respectively consolidated, after which the plaintiff, in one of the consolidated causes, became entitled to costs, and in the other the defendant;—the court directed the costs taxed and allowed to the defendant to be set off

against those taxed and allowed to the plaintiff; although the same underwriter was not the defendant in both actions. *Nunez v. Modigliani*, 1 H. Blk. 217.

2. If A. be equitably entitled to the costs of a nonsuit in an action by B. against C, and liable to pay the costs of a nonsuit in an action by himself (A.) against B; the costs of the nonsuit in the action by B. against C. may be set off against the costs of the nonsuit in the action by A. against B. *O'Connor v. Murphy*, 1 H. Bl. 657.

3. Costs taxed upon an interlocutory order made in an inferior court in the course of a suit there, may be set off. *Emerson v. Lashley*, 2 H. Bl. 248.

4. Where the plaintiff sued out execution against the defendant, an uncertificated bankrupt, notwithstanding the allowance of a writ of error, which execution was set aside, on the ground of irregularity, with costs, the court refused to permit the amount of those costs to be set off against the costs of the action. *Hill v. Febb*, 1 N. R. 311.

5. Motion to set off costs in a suit in C. B., for which the plaintiff here (in the Exchequer) had retained the defendant as the attorney (though he himself was not the party) against the judgment here, was granted. *Murphy v. Cunningham*, 1 Anst. 271.

(g) *In discharge of an execution.*

The court will not, in a summary way, enable a prisoner to set off a debt from the plaintiff, against the execution under which he is taken. *Philipson v. Caldwell*, 6 Taunt. 176.

(h) *By payment into court.*

A plaintiff will not be allowed to pay into court a cross-demand for which the defendant is suing him, to go in reduction of the damages that he shall recover from the defendant. *Sharbome v. Siffkin*, 3 Taunt. 525.

II. WHEN UNNECESSARY.

(a) *Where the demand is to be taken as part payment.*

Where a debt due from the vendor to the vendee is to be taken in part payment, it need not be set off in an action for the price. *Leeds v. Burrows*, 12 East, 1.

SET-OFF.

III. OF THE PLEA OF SET-OFF.

(a) *In relation to a bond.*

1. In pleading a set-off to debt on bond, or in setting off a debt due on bond, the sum averred to be due upon the bond, is material, and therefore traversable; and, if not traversed, is admitted. *Symmonds v. Knox*, 3 T. R. 65.

2. A material and definite averment is not rendered immaterial and indefinite, by being laid under a *videlicet*. Therefore, since in a set-off to debt on bond, it is necessary, under stat. 8 Geo. II, c. 24, s. 5, to set forth what is really due on the bond, the sum stated, though under a *videlicet*, is traversable. *Grimwood v. Barrit*, 6 T. R. 460.

3. Debt on bond. The plea, without craving oyer of the bond, and stating what was justly due thereon, pleaded a set-off to the supposed promises in declaration mentioned; treating the action as an action of *assumpsit*. Held, that the plaintiff might treat the plea as a nullity and sign judgment. *Penfold v. Hawkins*, 2 M. & S. 606.

(b) *Divisibility of,—in relation to a demurrer.*

Two parts of a plea of a set off, are as two counts in a declaration, and if one part be good, a general demurrer to the whole is bad. *Dowland v. Thompson*, 2 Blk. 910.

IV. OF THE REPLICATION TO THE PLEA OF SET-OFF.

(a) *Where the set-off comprizes a simple and a debt of record.*

A replication to a plea of set-off, comprizing two debts, one of record, the other a simple contract debt, protesting that the plaintiff owes the debt of record, that he is not indebted *modo et forma*, and concluding to the country, seems bad. *Solomons v. Lyon*, 1 East, 369.

V. ON THE WAIVER OF THE RIGHT OF.

(a) *Whether a discharge of the demand.*

There is no compulsion upon a defendant to make a set-off, and, if he please, he may bring a cross action. *Green v. Law*, 2 Smith, 668; 4 Camp. 134.

SETTLEMENT OF THE POOR. 867

VI. IN CRIMINAL CASES.

(a) *Of a fine estreated, against the expenses of a prosecution.*

The court cannot apply a fine estreated, in payment of the expenses of prosecution. *Rex v. ———*, 2 Anst. 523.

SETTLEMENT OF THE POOR.

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(b) *Of cumulative settlement, p. 871.*

(c) *Of evidence.*

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(c) *Of the contract of hiring,—secondly, by implying a contract.*

(c 1) *The case of the waiter at an inn, p. 872.*

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- (d) *Of the contract of hiring,—thirdly, it must be a contract for service.*
 - (d 1) *General rules to that effect, p. 873.*
 - (d 2) *Rules for ascertaining the nature of the contract, p. 873.*
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- (e) *Of the contract of hiring,—fourthly, it must be the contract of the servant.*
 - (e 1) *Rules ascertaining the contracting party, p. 873.*
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- (f) *Of the contract of hiring,—fifthly, it must be prospective, p. 873.*
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I. OF CERTAIN GENERAL RULES.

- (a) *On the mode of interpreting the law of settlement*.

In questions touching settlements, it is best to adhere to the letter of the law. *Rex v. The Inhabitants of Fillongley*, 1 T. R. 460.

- (b) *Of cumulative settlement*.

There cannot be a cumulative settlement in the same parish. *Edwards v. Bobbit*, 1 M. & S. 120.

- (c) *Of evidence*.

- (c 1) *In relation to the admissibility of a pauper's examination*.

1. *Query*, Whether the examination of a party touching his settlement taken by two justices, but not followed up by a removal to his alleged place of settlement, is a judicial act warranted by st. 13 & 14 Car. II, so that his family may be removed thereon after his death, or becoming insane? *Rex v. The Inhabitants of Eriswell*, 3 T. R. 707.

2. *Query*, Whether the examination of a pauper touching his settlement, taken by two justices pursuant to st. 13 & 14 Car. II, has an operation more conclusive than his simple declarations? *Rex v. The Inhabitants of Eriswell*, 3 T. R. 707.

3. The *ex parte* examination of a deceased pauper touching his settlement taken on oath before magistrates, is inadmissible upon a question of settlement, as evidence against the appellant parish. *Rex v. Inhabitants of Newnham Courtney*, 1 East, 373; *Rex v. Inhabitants of Ferry Frystone*, 2 East, 54; *Rex v. Inhabitants of Abergwilly*, Id. 63.

(c 2) *In relation to the admissibility of a soldier's examination.*

1. That the examination of a soldier touching his settlement may be evidence, it must be first authenticated. *Rex v. The Inhabitants of Bilton-with-Harrowgate*, 1 East, 13.

2. No other attested copy of the examination of a soldier before a magistrate touching his settlement is legal evidence, while the original is in existence, except that given to the soldier. *Rex v. Inhabitants of Clayton-le-Moors*, 5 T. R. 704.

3. The original affidavit as well as the copy, made by a soldier touching his settlement, is evidence. *Rex v. The Inhabitants of Warley*, 6 T. R. 534.

(c 3) *In relation to the admissibility of a pauper's declarations.*

Query, Whether the declarations of a pauper who cannot be produced, as where he is dead, or has become insane, touching his settlement, are admissible? *Rex v. The Inhabitants of Eriswell*, 3 T. R. 707.

(c 4) *In relation to the admissibility of a rated parishioner's declarations.*

In a question of settlement between two parishes, the declarations of the rated inhabitants of either parish are evidence against the parish. *Rex v. Inhabitants of Hardwick*, 11 East, 578; *Rex v. Inhabitants of Whitley Lower*, 1 M. & S. 636.

II. OF SETTLEMENT BY HIRING AND SERVICE.

(a) *Of persons capable of acquiring a settlement by hiring and service.*(a 1) *An unmarried person, within st. 3 W. & M., c. 11, defined.*

The st. 3 W. & M., c. 11, s. 7, enacts, that "if any unmarried person, not having child or children, shall be hired into any parish for one year, such service shall be deemed a good settlement therein." Whether a servant be an unmarried person within the statute, must be decided with reference to the time of contracting, not of entering into the service. *Rex v. The Inhabitants of Allendale*, 3 T. R. 382; *Rex v. The Inhabitants of Stannington*, Id. 385.

(a 2) *An apprentice.*

That a settlement may be gained by hiring and service, the servant at the time

of contracting, must be *sui juris* (since otherwise he is incompetent to contract) which he is not, if having engaged as an apprentice the apprenticeship was then subsisting. *Rex v. The Inhabitants of the Parish of the Holy Trinity in the Minories*, 3 T. R. 605; *Rex v. Chipping Warden*, 8 T. R. 108.

(a 3) *A deserter.*

Neither a deserter from the king's service, nor an apprentice, can lawfully hire himself so as to acquire a settlement during the continuance of those several relations. *Rex v. Norton*, 9 East, 206.

(a 4) *An invalid soldier on furlough.*

An invalid soldier of the line, on furlough from his depôt, having relinquished his pay during absence, but whose services may be called for at any time, cannot gain a settlement by hiring. That the relation of master and servant, *quoad hoc*, may subsist, the servant must be *sui juris*, having the power of communicating to the master an absolute right to his service for the whole period of hiring; whereas here he was incumbered with another relation which might defeat the performance of his engagement. Bayley J. dissent. *Rex v. Inhabitants of Beaulieu*, 3 M. & S. 229.

(b) *Of the contract of hiring,—and first, general rules.*(b 1) *Of admitting the subsequent acts of the parties in explanation.*

If the original terms are equivocal, they may be explained by the subsequent conduct of the parties. *Rex v. Overnorton*, 15 East, 347.

(c) *Of the contract of hiring,—secondly, by implying a contract.*(c 1) *The case of the waiter at an inn.*

The waiter at an inn being taken ill, sends for B. to assist him, who stays (lodging and boarding in the inn) as helper to the waiter for a year and upwards, but without any communication with the master, except that he sometimes sent him on errands. Held, that he was the servant of the waiter, not the master, and therefore did not gain a settlement. *Rex v. The Inhabitants of St. Matthew Ipswich*, 3 T. R. 449.

(c 2) *The case of the boy living with his uncle.*

A boy lived with his uncle as a relation, and not under any hiring; he was afterwards hired by another person as a yearly servant, but returned to his uncle, upon his request by letter, saying, that if he would come and live with him as before, he could surely make it as good or better for him than a common service. There was no agreement with the uncle after his return, either as to time or consideration of service; but the uncle often promised, that if he would stay with him for his life, he would leave him his crop, farm and stock. He lived with his uncle several years, by whom he was found in meat, clothes, and pocket-money, but received no wages. He gained no settlement. *Rex v. Stokesley*, 6 T. R. 757.

(d) *Of the contract of hiring,—thirdly, it must be a contract for service.*

(d 1) *General rules to that effect.*

1. Whether a party has acquired a settlement by hiring and service, must depend upon whether there originally, and in the intention of the parties, was a contract to hire the party as a servant. *Rex v. Inhabitants of Mountsorrel*, 2 M. & S. 460.

2. Service as an apprentice, though the binding be void, cannot be construed into service as an hired servant. *Rex v. Ditchingham*, 4 T. R. 769.

(d 2) *Rules for ascertaining the nature of the contract.*

1. Whether a contract be a contract of apprenticeship or of service, depends upon the intention. *Rex v. Laindon*, 8 T. R. 379.

2. If the parties use the term apprentice, in describing the relation to be created by their contract, or otherwise expressly declare their intention to stand in the situation of master and apprentice, the contract cannot be considered as one for hiring as a servant. *Rex v. Margram*, 5 T. R. 153.

3. *Seemle*, that wherever the contract is executed with the solemnities incident to a binding by deed, and the object of the agreement is to instruct the party serving, it is rather to be considered as a contract of apprenticeship than of hiring as a servant. *Rex v. Rainham*, 1 East, 531.

4. A contract, to serve for the purpose of learning a trade, is an hiring as a servant, in the absence of circumstances, denoting a different intention. *Rex v. Coltishall*, 5 T. R. 193.

(d 3) *Examples.*

1. An agreement with a weaver to serve him for a year and a half, the master to teach him to weave, and the pauper to have half his earnings, and find himself in every thing, is a contract of service, not of apprenticeship. *Rex v. Eccleston*, 2 East, 298.

2. A contract that the pauper should be with the master, and should work with him for two years, and have what he got, and should allow the master 2s. per week out of his gains, viz. 1s. for teaching him the business of a frame-knitter; 9d. for the rent of a frame; and 3d. for the standing, is a contract, not of apprenticeship, but of hiring. *Rex v. Burbach*, 1 M. & S. 370.

(e) *Of the contract of hiring,—fourthly, it must be the contract of the servant.*

(e 1) *Rules ascertaining the contracting party.*

1. Where a contract of hiring is made by a person, standing in a peculiar relation to the pauper, on his behalf and for his benefit, and the pauper performs his part of the contract, his adoption thereof may be inferred. *Rex v. Burbach*, 1 M. & S. 370.

2. After a boy has hired himself out, the circumstance of the overseer furnishing him with the means of continuing in the service, will not make the contract that of the overseer. *Rex v. Dunton*, 15 East, 352.

(e 2) *Example.*

A Greenwich pensioner, placed out to board by his parish at 2s. 6d. a week, paid by them to an inhabitant of another parish, for his board, &c. he working as a servant for him, does not acquire a settlement by such residence and service. *Rex v. Rickinghall*, 3 Smith, 373; 7 East, 373.

(f) *Of the contract of hiring,—fifthly, it must be prospective.*

Where the agreement is made so, that bygone time is to be calculated as part of

the year, and included in computing it, this is called a retrospective hiring, and no settlement can be gained by service under it. *Rex v. Morton*, 4 T. R. 257.

(g) *Of the contract of hiring,—sixthly, it must be for a year's service.*

(g 1) *General rule to that effect.*

To gain a settlement there must be a hiring for a year. A contract for a shorter period, though made expressly to prevent a settlement, is not sufficient. *Rex v. The Inhabitants of Mursley*, 1 T. R. 694.

(g 2) *Rules for ascertaining the duration of the contract.*

1. If no particular time is expressed, in a contract of hiring, for the duration of the service, or is reasonably to be implied, a hiring for a year is to be intended. A reservation of weekly wages imports a hiring by the week, unless the inference which arises from the reservation of weekly wages be repelled by other circumstances; and it is not repelled by the circumstance, that, in the harvest month (only), the weekly wages of the servant, hired as a servant in husbandry, are to be increased. Under such a contract, there is no obligation either upon the master or the servant to continue it beyond a week. *Rex v. Inhabitants of Dodderhill*, 3 M. & S. 243.

2. Wherever the relation of master and servant is to continue for an indefinite time, and cannot be put an end to at the election of either party, without notice, the hiring must be understood to be an hiring for a year; but where the time of notice corresponds with that at which the wages are rendered payable, the contract is no longer indefinite, but is an hiring for the precise time at which the wages are payable. *Rex v. Hampreston*, 5 T. R. 205; *Rex v. Hanbury*, 2 East, 423.

3. Where the reserved interval between the time of giving warning, and that of quitting the service, is longer than the time at which the wages are made payable, it is strong enough to controul the conclusion against a yearly hiring, which would otherwise arise from that mode of payment. And this not only where it is accompanied with corroborating circumstances, such as an hiring "at three shillings a week the year round, each to be at

liberty on a fortnight's notice; but the servant not to go away at seed-time, hay, or harvest." *Rex v. Hampreston*, 5 T. R. 205. But also where the insertion of the notice is the only circumstance from whence the inference can be drawn. *Rex v. Birdbrooke*, 4 T. R. 245.

4. Every contract must be determined, nothing opposing, by the intention of the parties. If, therefore, a contract of service, expressed to be made for a shorter term than a year, is, in reality, meant to last for that period, it is a hiring for a year. *Rex v. the Inhabitants of Mursley*, 1 T. R. 694.

5. The apprehension of the pauper cannot vary the nature of the contract. *Rex v. the Inhabitants of Newton Toney*, 2 T. R. 453.

6. The inference of a yearly hiring is not rebutted by proof that it was connected with previous service for a less period. *Rex v. Long Wharton*, 5 T. R. 447; and see *Rex v. Hale*, 5 T. R. 668.

7. When a hiring on the face of it necessarily appears to be for less than 365 days, no usage to consider the time specified in the hiring, as a year, will make it sufficient to gain a settlement. *Rex v. Hanwood*, Dougl. 439.

8. A hiring for 365 days, the year consisting of 366, is not a hiring for a year. *Rex v. the Inhabitants of Ackley*, 3 T. R. 250.

(g 3) *Relation of, to an antecedent period.*

If, on the expiration of a service, fresh terms are offered to the servant for the ensuing year, who continues serving as before, until the second day after the offer when he accepts it, the acceptance has relation back to the time of the offer, so that there has been a hiring for a year. *Rex v. The Inhabitants of Sulgrave*, 1 T. R. 778.

(g 4) *Of computing days, inclusively or exclusively.*

1. The word "until" (such a day) must be taken to be inclusive. Therefore, a hiring from the day after Old Martinmas Day, until the Old Martinmas Day following, is a hiring for a year. *Rex v. The Inhabitants of Skipton*, 1 T. R. 490.

2. A hiring on the day after Michaelmas, to serve till the Michaelmas following, is sufficient; "till Michaelmas," being inclusive. *Rex v. Syderston*, Dougl. 441.

3. A hiring three days after Michaelmas, to serve "until next Michaelmas," cannot be intended to mean "until this time next year." *Rex v. The Inhabitants of Ackley*, 3 T. R. 250.

(g 5) *Examples of a yearly hiring.*

1. A hiring for a year from Whitsuntide to Whitsuntide, if such hiring is according to the usage of the country, is sufficient, although the space of time should be less than a year. Dougl. 440.

2. A servant is hired for a period less than a year, at a gross sum for the whole time. On its expiration the master says, "You may as well stay on 'an end,'" meaning an indefinite time, without mentioning wages. Held, that the second hiring was a general one; and, therefore, a hiring for a year. *Rex v. The Inhabitants of Macclesfield*, 3 T. R. 76.

3. A. met a servant-girl, then in place with B, and asked her whether she was again hired to B.; she, replying in the negative, he inquired "if she would come and live with him, and take care of his child?" she consented, and, soon after, went to him. Held, a yearly hiring. *Rex v. Worfield*, 5 T. R. 506.

(g 6) *Examples of a hiring for less than a year.*

1. A hiring at weekly wages, is not an implied hiring for a year. *Rex v. The Inhabitants of Newton Toney*, 2 T. R. 453. *Rex v. The Inhabitants of Odiham*, *Id.* 622.

2. The pauper being in service in W, wrote to her mother, desiring her to look out for a place for her, who in consequence, previous to old Michaelmas, treated with Mrs. P, of the parish of R. Mrs. P. informed the mother, that she would give her daughter the same wages as she did her other servants, and wait till she came down, and desired her to come as quickly as she could. But the mother made no absolute agreement for her daughter, but afterwards informed her, that she had got a place for her, if she liked it. The pauper left W. at the expiration of her service, came to R. on 16th October, and went into Mrs. P's service on 18th, when for the first time the terms were settled. The hiring is from the 18th. *Rex v. Rushall*, 7 East, 471.

3. Where a statute-fair was held yearly, on the day after old Michaelmas, except when old Michaelmas falls on Saturday, and then the fair is held on the ensuing Monday; a hiring from such Monday, until the old Michaelmas following, will not confer a settlement. *Rex v. Standon Massey*, 10 East, 576.

4. Where there is a hiring at weekly wages, and nothing is said as to the term, the hiring will be held weekly. *Rex v. Pucklechurch*, 5 East, 382; 1 Smith, 552.

5. A hiring at so much a week, for as long time as the master and servant could agree, is a hiring by the week. *Rex v. Mitcam*, 12 East, 351.

6. A hiring at 8s. per week, and two guineas for the harvest, to do any thing the gardener should set him about, is not a yearly, but a weekly hiring. They endeavoured to distinguish this case from *Rex v. Dodderhill*, 3 M. & S. 243, saying, that here was an agreement for a gross sum to be paid for the harvest, and not merely, as in that case, for an increase of the weekly wages in the harvest month; that "for the harvest" imports a consolidated period, at least as long as a month, which is inconsistent with the notion of a weekly hiring. But held, the parties only contemplated that possibly the retainer might last through the harvest. *Rex v. Inhabitants of Lambeth*, 4 M. & S. 315.

(h) *Of the contract of hiring,—lastly, its duration must be uninterrupted.*

(h 1) *General rule to that effect.*

That a settlement may be gained by hiring and service, the original contract of hiring must continue without interruption for a year. *Rex v. The Inhabitants of Gresham*, 1 T. R. 101.

(h 2) *Rules ascertaining an uninterrupted duration.*

1. Where on a hiring for a year, a permission is given to be absent for a part of it, though for the express purpose of preventing a settlement, the relation of master and servant continues throughout the year, such permission being a dispensation *pro tanto* only, and not changing the nature of the contract. *Rex v. The Inhabitants of Sulgrave*, 2 T. R. 376.

2. Where the contract is explicit, it is not how much the servant actually does, but what he has agreed to do, that is to

be considered. *Rex v. Kingswinford*, 4 T. R. 219.

3. An exception cannot be implied from the custom of the country, and much less from that of a particular house of manufacture. *Rex v. Horwick*, 10 East, 489.

(h 3) *Examples of uninterrupted duration.*

1. A hiring by the year, to work by the piece, with an implied liberty from the usage of the place to be absent when the servant pleases, but not to work for any other master, and service under it, are sufficient, though the servant may have absented himself at different times in the course of the year. *Rex v. Birmingham*, Dougl. 333.

2. A militia-man being hired for a year, with an express agreement that he shall be absent on duty for a month, and in lieu thereof, serve a month over the year, gains a settlement without serving the additional month. *Rex v. Winchcomb*, Dougl. 391.

3. A liberty reserved in a contract of service, that the servant might earn what she could by her own labour, is not inconsistent with the relation of master and servant, since she must first of all perform what services may be due to her master. Under such a contract, therefore, for a year, a settlement may be gained. *Rex v. The Inhabitants of Chertsey*, 2 T. R. 37.

4. Service, under an agreement to serve for three years at weekly wages, to learn the trade of a bricklayer, and to do any other work his master was to set him about, "and if prevented at any time from working, by bad weather, illness, or from his master's not having employment for him," a proportionable deduction was to be made from his week's wages for such loss of time, gains a settlement, and this, though such occasional deductions were made. *Rex v. Marsham*, 1 East, 239.

(h 4) *Examples of interrupted duration.*

1. Service under a contract to serve from six in the morning till seven in the evening, except on Sundays, confers no settlement. *Rex v. Kingswinford*, 4 T. R. 219.

2. A hiring "for five years, at weekly wages, as a colt sheer-man to work twelve hours each day," confers no settlement. *Rex v. North Nibley*, 5 T. R. 21.

3. An exception of two days in each half year (the servant being a pensioner of the East India Company) to go and receive his pension, is not a sufficient hiring. *Rex v. Over*, 1 East, 599.

4. Service, under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends, confers no settlement. *Rex v. Rusholme*, 10 East, 325.

5. Service under a hiring for a year as a shepherd, at weekly wages, with liberty to be absent during the sheep-shearing season, but to find a fit man at his own expense, to do his work whilst absent,—his wages to go on; gives no settlement. *Rex v. Arlington*, 1 M. & S. 622.

(i) *Of the year's service.*

(i 1) *General rules.*

1. Service, which is but a day or two short of a year, does not satisfy the statute nor confer a settlement. *Rex v. Grantham*, 3 T. R. 754. Vide *Rex v. Whittlebury*, 6 T. R. 464.

2. Service for a year, consisting of 365 days, is sufficient, although the agreement be for a longer period. *Rex v. Ulverstone*, 7 T. R. 564.

(i 2) *Rules relative to the suspension of the service.*

1. Where the completion of the service is obstructed by any act of violence on the master's part, it causes no interruption in the service. *Rex v. Hardhom*, 12 East, 51.

2. *Semble*, a servant imprisoned under 20 Geo. II, c. 19, s. 2, cannot be considered as serving for the purposes of gaining a settlement during the time he is in prison. *Rex v. Inhabitants of Barton upon Irwell*, 2 M. & S. 399.

(i 3) *Rules as to dispensation and dissolution,—and first, in relation to absence.*

1. The criterion to determine whether absence is under a dispensation with service, or a dissolution of the contract, is, whether the servant continues liable to serve for the whole year, though the master dispenses with the actual service for part of it. If he does, the servant gains a settlement, because the relation of master and servant subsists all the year, and the master may resume his right to the service whenever he chooses; but if the master has once parted with his controul

over the servant, so that neither himself nor the servant retain a power of compelling subsequent performance of the contract, it is dissolved. *Rex v. Thistleton*, 6 T. R. 185; *Rex v. Mancroft*, 8 T. R. 477; *Rex v. Maidstone*, 12 East, 550.

2. The length of the absence is a circumstance immaterial. *Rex v. East Shefford*, 4 T. R. 804.

3. No distinction arises from absence taking place at the beginning, in the middle, or at the end of the year. *Rex v. East Shefford*, 4 T. R. 804.

(i 4) *Rules as to dispensation and dissolution,—secondly, in relation to the act of one party.*

Though a hiring for a year may, by mutual agreement between the servant and the master, be terminated before its expiration, yet neither can put an end to it by his own act alone. Therefore, if the servant be turned away before the end of the year, without cause, he nevertheless gains a settlement under the hiring; since his going away is not an acquiescence, but a submission to power; and the service is considered as dispensed with for the remainder of the year. The same holds where the servant is discharged by reason of the master's becoming bankrupt. *Rex v. The Inhabitants of St. Philip in Birmingham*, 2 T. R. 624; *Same v. The Inhabitants of St. Andrew, Holborn*, Id. 627.

(i 5) *Rules as to dispensation and dissolution,—thirdly, in relation to agreement in general.*

A dissolution must be inferred where the agreement to separate is made by consent, and with a view of entering into another service before the year expires. *Rex v. Thistleton*, 6 T. R. 185; *Rex v. Mildenhall*, 12 East, 482.

(i 6) *Rules as to dispensation and dissolution,—fourthly, in relation to a new agreement.*

1. A dissolution of the contract may appear, by the parties coming to a new agreement, inconsistent with that under which they had previously lived. *Rex v. Great Chilton*, 5 T. R. 672.

2. An invalid contract of apprenticeship by a minor, does not destroy a valid contract of hiring, previously entered into. *Rex v. Shinfield*, 14 East, 541.

(i 7) *Rules as to dispensation and dissolution,—fifthly, in relation to an agreement before a magistrate.*

If the master and servant voluntarily go before a magistrate, and agree to leave the decision of their dispute to him, and the latter is discharged, it amounts to a solemn dissolution of the contract. *Rex v. King's Pyon*, 4 East, 351; *Rex v. Leigh*, 7 East, 539.

(i 8) *Rules as to dispensation and dissolution,—sixthly, in relation to a turning away.*

There is no constructive service for the residue of the term, where the servant, after being turned away, refuses to come back, by reason of the master's ill-usage. *Rex v. Grantham*, 3 T. R. 754.

(i 9) *Rules as to dispensation and dissolution,—seventhly, in relation to an arrest.*

An interruption of the service, by arrest of the servant, is not a dissolution of the contract, if the master chooses to receive him again. *Rex v. The Inhabitants of Kenilworth*, 2 T. R. 598.

(i 10) *Rules as to dissolution and dispensation,—eighthly, in relation to an imprisonment.*

The 20 Geo. II, c. 19, s. 2, empowers magistrates to punish servants for misbehaviour, either "by commitment to the house of correction, or by abating some part of their wages, or by discharging them from the service." An imprisonment under this statute, does not dissolve the relation of master and servant, which continues notwithstanding, so that it is no obstacle to the gaining of a settlement under a contract of hiring for a year. It would be clearly against the policy of the law if the servant, by his own act of delinquency, should have the power of dissolving the contract. *Rex v. Inhabitants of Barton-upon-Irwell*, 2 M. & S. 329.

(i 11) *Rules as to dissolution and dispensation,—lastly, in relation to sickness.*

If the servant is disabled by sickness after the service is commenced, where the master cannot put an end to the contract, but is obliged to maintain his servant; yet, if the latter consent to a dissolution,

there is no legal or constructive service. *Rex v. Subbrooke*, 4 East, 356.

(i 12) *Example of a dispensation.*

A servant, hired for a year, served until within seven days of the end of it; when an information having been laid against her master for keeping a gaming-house, he quitted his house and told his servants that he had no longer occasion for their services, and then paid the pauper her whole year's wages, and she did not engage in any new service till after the year expired. The master would have kept the pauper, except on account of his being so obliged to quit the house, and the pauper was unwilling to leave his service. Held a dispensation. *Rex v. St. Mary Lambeth*, 8 T. R. 236.

(i 13) *Examples of dissolution.*

1. The pauper having served until nine days before the expiration of his year, went away on Sunday morning in order to get another place, when his year should be up, without asking leave or mentioning it to his master. He returned on the Tuesday following, at six in the morning, and asked his master what work he should go about; the master told him he might go and serve the master he had worked for the day before. He saw his master an hour afterwards, who then paid him his wages up to that time only. No conversation passed. He then went away and did not return: he wished to stay out the year, but his master refused. Held to be a dissolution. *Rex v. Clayhydon*, 4 T. R. 100.

2. The pauper served until within five days of the expiration of his year, when he went to a statute-fair to seek a service for next year. Being taken ill of a fever there, he went home to his mother, and continued ill for six weeks. Having no money to maintain him in his illness, he, on the same night, desired his mother to go to his master for his money and to bring away his clothes; the mother went next day and brought his money, all but one shilling, which she told him his master had stopped for the remainder of the year, and gave it to him, together with his clothes, with which he was satisfied; and he thought himself at liberty to hire himself to another master, if he had been well enough. Held a dissolution by consent. *Rex v. Whittlebury*, 6 T. R. 464.

3. Where a servant, sixteen days before the expiration of her year, was kicked and beaten by her master, she complained to her father of the ill-treatment, and in conjunction with her father, required her master to dismiss her, under a threat of applying to a magistrate for redress, on account of the assault. The master then paid her the whole year's wages, and told her she might serve the remainder of the year, but she refused so to do, and left the service. Held a dissolution. *Rex v. Upwell*, 7 T. R. 438.

4. Where a yearly servant continued to serve, until within a fortnight or three weeks of the expiration of the year, when in consequence of his master's kicking him, he would not stay, but went to his father's house; he returned before the end of the year with his father, and received the whole of his wages, and half-a-crown for himself; his master asked him to stay, but he refused, and went back to his father's house. He gained no settlement. *Rex v. Corsham*, 2 East, 303.

5. Where a servant who was hired for a year, on 18th Oct. with liberty to quit on a month's notice, or a month's warning, gave notice to quit at Old Michaelmas; and, upon applying to her mistress for wages, she told her, that she had a week to serve. The servant offered to serve the week, but the mistress said, it was no matter. Held, a dissolution of the contract. *Rex v. Rushall*, 3 Smith, 452; 7 East, 471.

6. A pauper, hired for a year, ending 31st March, goes, on 25th March, with leave of his master, to a mop, or statute, for hiring servants, in order to get a place at the expiration of his service, and returning early in the morning of the 26th; the master turns him away, offering him less than his wages; the pauper, on the next day, summons the master before a magistrate, who ordered the master, verbally, to deduct 2s. 6d. from his whole wages; the pauper goes into another service, and is, shortly afterwards, paid his whole year's wages. Held, that he gained no settlement. *Rex v. Leigh*, 3 Smith, 567; 7 East, 539.

7. The pauper was hired on Michaelmas-day, 10th Oct. 1797, for a year, ending Michaelmas-day, 10th Oct. 1798; he continued to serve until the 8th Oct., on which day he married, and his master

consented to his leaving the service, and paid him his full year's wages. On the 9th, the pauper hired himself, and went into another service. The sessions found this to be a dissolution, and K. B. confirmed the order. *Rex v. Maidstone*, 12 East, 550.

(k) *Of connecting services under several hirings.*

(k 1) *General rule.*

1. Two services of the same nature may be joined, if there be no chasm between them. *Rex v. The Inhabitants of Sulgrave*, 1 T. R. 778.

2. Two services, under different hirings, may be tacked together so as to make a sufficient service for a year, even when there has been an interruption between them, and an absence from the master's house for part of a day. *Rex v. Ellesfield*, Dougl. 310, n.

3. Service for forty days under the yearly hiring, is not necessary; but service under it, for (*c. gr.*) ten days, if coupled with antecedent services under former hirings, confers a settlement. *Rex v. Adson*, 5 T. R. 98.

4. When two services, under different hirings, amount together, to a year, if they are uninterrupted, an increase of wages for the second service does not prevent the servant from gaining a settlement. *Rex v. Under-Barrow*, Dougl. 309.

(k 2) *Example.*

The pauper hired himself by the week, and nothing was said about Sunday in the contract; but he worked on that day occasionally, when asked by his master, without receiving any additional wages, only sometimes victuals. He received his wages weekly, and lodged and boarded himself. Having served thus for nine months, he was hired by his master for a year, as a family-servant, and served eleven months. Held, that the services might be connected. *Rex v. Sutton*, 1 East, 656.

(l) *Of service with different masters.*

1. A master dying three weeks after the servant's year commenced, he continued to serve the remainder with the widow and her sons, by whom the farm was continued on: he gained a settlement. *Rex v. Hardhorn*, 12 East, 51.

2. Where a servant, with his master's consent, worked with different masters, receiving their wages, and making an allowance to his original master out of the wages payable by him, in the same proportion as the time of his absence bore to his entire year. Such absence was held to be dispensed with, and the service virtually performed to the first master. *Rex v. Undermilbeck*, 5 T. R. 387.

(m) *Of the residence by, and place in which a settlement is gained.*

1. If a servant live apart from his master, from disease and disability, he shall not be settled in the parish in which he dwells during illness, but in that where he resided for the last forty days of his effective service. *Rex v. Sutton*, 5 T. R. 657.

2. When a servant has resided part of the year in one parish, and part in another, at different intervals, making, when added, more than forty days in each: his settlement is in the parish where he slept the last night. *Rex v. Hulland*, Dougl. 657; *Rex v. Iveston*, Id. 658, n.

3. If there is a hiring for a year, and service for part of that year, in the parish of A., and before the end of the year the servant removes with the master to the parish of B., serves out the year there, is hired to the same master for another year, with an increase of wages, and serves several months longer in B., without an interval, he gains a settlement in B. *Rex v. Under-Barrow*, Dougl. 309.

(n) *Of the proofs necessary to support this settlement.*

(n 1) *Presumptive evidence of a hiring.*

1. Serving a year warrants the presumption of a hiring for a year. *Rex v. Inhabitants of Lyth*, 5 T. R. 327.

2. A subsequent hiring for a year may be presumed from three years' service, though the original hiring was for part of a year only. *Rex v. Inhabitants of Abatton*, 5 T. R. 447.

(n 2) *Presumption rebutted.*

The inference of a yearly hiring is not rebutted by the servant's leaving his place in some succeeding year, at a period which does not correspond with its regular close from the time of entry upon the service. *Rex v. Worfield*, 5 T. R. 506.

(n 3) *Admissibility of the deceased servant's declarations.*

The declarations of a deceased person, as to being hired for a year, are not evidence of that fact. *Rex v. Inhabitants of Nuneham Courtney*, 1 East, 373.

(n 4) *Admissibility of an unstamped indenture of apprenticeship, in explanation of the terms.*

Though an unstamped indenture of apprenticeship is not admissible to establish the fact of apprenticeship, yet is it to prove for what period, and on what terms, the parties contracted, with the view of applying those terms to a service under a verbal engagement, subsequent to the time at which it was to expire. *Rex v. Inhabitants of Pendleton*, 15 East, 449.

III. OF SETTLEMENT BY APPRENTICESHIP.

(a) *Of the binding necessary to confer a settlement,—and first, general rule.*

Although the parties intend a contract of apprenticeship, it will not enure as such, if defective in substance or in form. *Rex v. Laindon*, 8 T. R. 379.

(b) *Of the binding necessary to confer a settlement,—secondly, of voluntary bindings.*(b 1) *What bindings are considered such.*

A child, eleven years old, is taken before a magistrate by parish officers, for the purpose of binding him to a master chosen by his parent. Upon a refusal by the justice, on the ground that the master had a sufficient number of apprentices already, the parties meet at an inn, and execute an indenture of apprenticeship for seven years, all the expenses of the binding being paid by the parish. Held, that since the binding did not appear to be intended a binding as a parish apprentice, (the parish officers having declared, on the justice's refusal, that, if they could not have him bound there, they would in another place) it was valid, and capable of conferring a settlement. *Rex v. Inhabitants of Wilby*, 2 M. & S. 501.

(b 2) *Must be by deed.*

The stat. 31 Geo. II, c. 11, does no more than cure the want of indenting; the binding must still be by deed. *Rex*

v. Dettingham, 4 T. R. 769; *Rex v. Margram*, 5 T. R. 153.

(b 3) *Of modes of expression.*

No technical expressions are essential, provided the parties shew, by the words used in the instrument, an evident intention to constitute the relation of master and apprentice. *Rex v. Laindon*, 8 T. R. 379.

(b 4) *Of the parties to.*

1. An indenture was entered into and executed by the master and the father of H, then fourteen years old, to teach him the art and mystery of weaving, for five years. H. was no party to the indenture, and his father entered into no covenant that he should serve. This is no binding as an apprentice. *Rex v. Cromford*, 8 East, 25.

2. Service under an indenture of apprenticeship binding an adult, not executed by him, though by the master and father with his assent, confers no settlement. *Rex v. Repon*, 9 East, 296.

3. Service under an indenture of apprenticeship (here for six years, the boy being seventeen years old when bound) not executed by the master, but executed by the boy, gains a settlement. *Rex v. Inhabitants of Ribchester*, 2 M. & S. 139.

(b 5) *Must be stamped.*

Service under an indenture of apprenticeship, void for want of a stamp; thus, a stamp denoting payment of the additional duty, confers no settlement. *Rex v. The Inhabitants of Edgeworth*, 3 T. R. 353.

(b 6) *Divisible nature of.*

An apprenticeship, void for the first half of the period contracted for, by reason that the apprentice is not, during that period, *sui juris*, is not valid for the latter half. *Rex v. Inhabitants of Bow*, otherwise *Nymett Tracey*, 4 M. & S. 383.

(b 7) *Of a binding by the trustees of a charity.*

Funds are bequeathed to trustees in trust, with the interest thereof, to put out yearly six poor boys apprentices. A poor boy is, with the consent and approbation of the trustees, bound apprentice for seven years, for the consideration of 20*l.*, stated in the indenture to be paid by the trustees

to the master, who were also recited to be parties to the indenture; but it was only executed by the boy and the master. In fact, only part of the 20*l.* was paid, the residue being retained by the agent of the trustees, for the costs and expenses of the binding. Held, 1. That there was no necessity that the trustees should involve themselves by becoming parties to the covenant for binding. 2. That the consideration was fully stated, within the statute 8 Ann, c. 9, s. 35, which directs the money received or paid, or agreed for, with every apprentice, to be truly inserted in the indenture. *Rex v. Inhabitants of Quainton*, 2 M. & S. 338.

(b 8) *Example of an insufficient binding.*

A father agreed with A, that A. should take his son for six years to teach him a certain trade; and he was to allow A. so much per week for the first three years, for teaching and boarding the son. Held, that this was a defective contract of apprenticeship, and that the son, by serving A. for the six years, did not gain a settlement. This case is distinguishable from *Rex v. Little Bolton*, Cald. 367, since by this contract the son was entitled to none of his earnings, and instead of receiving wages from his master, his master was to receive wages from him as the price of teaching him; it was a hiring of the master to teach the apprentice. The whole contract of the father was bottomed, and had for its object, the instruction of the son and nothing else. *Rex v. Inhabitants of Mountsorrel*, 2 M. & S. 460.

(c) *Of the binding necessary to confer a settlement,—lastly, of the binding of parish apprentices.*

(c 1) *Parties to.*

1. A binding by two persons, styling themselves churchwardens and overseers, who had been appointed overseers while one of them was churchwarden, is void. *Rex v. All Saints, Derby*, 13 East, 143.

2. The churchwardens of the parish at large (in which the township is situated) need not join in the execution of an indenture of apprenticeship, executed by the overseers of a township which has no churchwardens or chapelwardens, and maintains its own poor separately. *Rex v. Nantwich*, 16 East, 228.

3. Under stat. 43 Eliz. c. 2, justices are to bind apprentices "where the justices shall see convenient;" this provision, therefore, empowers them to bind to a master resident in a different county to their own; and the 9th section, which directs that "the justices shall only act within their respective limits," only means that they shall not interfere where the apprentice resides in another county. The stat. 8 & 9 W. III, c. 30, s. 5, is so far restrictive of this power, that the binding is not valid, unless the master assents. If the apprentice assent by serving under the indenture, it is sufficient, though he do not execute it. *Rex v. The Inhabitants of St. Nicholas, Nottingham*, 2 T. R. 726.

(c 2) *Of the assent, and signing by magistrates.*

1. The assent by justices to the binding of parish apprentices, is a judicial act; therefore it cannot be given by each separately. *Rex v. The Inhabitants of Hamstall Ridware*, 3 T. R. 380.

2. It is sufficient, although one magistrate signs the indenture when alone, provided he is present afterwards when the other signs it. *Rex v. Winwick*, 8 T. R. 454.

(d) *Of the service,—and first, of connecting different services.*

For the purposes of settlement, the latter part of the service of an apprentice may be connected with the former, notwithstanding an intermediate service. *Rex v. The Inhabitants of Sandford*, 1 T. R. 281.

(e) *Of the service,—secondly, of service with another person.*

(e 1) *General rules.*

1. Though an apprentice is not strictly assignable nor transmissible, yet if he continue with an assignee, or a personal representative of his master, with consent of all parties and his own, that will be a continuation of the apprenticeship sufficient to gain a settlement. *Rex v. Stockland*, Dougl. 70.

2. If the master is applied to for his consent to a particular service, and gives it, that shall be considered as a service with the first master, and confers a settlement, but an indiscriminate leave to serve

any person, will not. *Rex v. Shebbear*, 1 East, 75.

3. It is to be lamented that it should ever have been determined, that an apprentice serving another person, with the leave of his original master, in another parish, should gain a settlement in that parish. *Rex v. Inhabitants of Ribchester*. 2 M. & S. 138.

4. The service with the second master must be with consent of the first. *Rex v. St. Paul's Bedford*, 6 T. R. 452.

5. Where master and apprentice agree to terminate the apprenticeship, which, however, enures notwithstanding in point of law; as where parish officers, being parties to the indenture, have not given their consent; a service by the apprentice with one to whom he hires himself at his master's recommendation, goes for nothing; it is not a service as a servant, since he is not *sui juris*; nor is it a service under the indenture of apprenticeship, since the parties never intended that it should be. *Rex v. The Inhabitants of Sandford*, 1 T. R. 281.

6. The pauper having been regularly bound out by her parish, the master during her term, by a written indenture legally stamped and executed by all parties, in consideration of 5*l.* 5*s.*, bound her with her own consent to one S. as an apprentice, till twenty-one. No settlement was gained by service under the second indenture. *Rex v. Christowe*, 11 East, 95.

(e 2) *The nature of the consent defined.*

1. That an apprentice may gain a settlement by serving a second master for forty days, under the original contract, the express consent of the first master is requisite, since otherwise, there has been no assignment, and mere knowledge is not sufficient. *Rex v. The Inhabitants of the Parish of the Holy Trinity in the Minories*, 3 T. R. 605.

2. That the service of an apprentice with another master may be reckoned service under the indenture of apprenticeship, the old master must consent that the apprentice should serve with the new one, and thus that the arrangement be made under his direction. A mere recommendation to the apprentice to go and serve with him is insufficient. *Rex v. The Inhabitants of Sandford*, 1 T. R. 281.

(e 3) *Consent, by whom given.*

1. Consent may be given not only by the original master, but by his executor, *Rex v. St. Paul's Bedford*, 6 T. R. 452; *Rex v. Stockland*, Dougl. 70. Even an executor *de son tort*. *Rex v. Barnsley*, 1 M. & S. 377.

2. Where a parish apprentice, since 32 Geo. III, c. 57, served the son of his original mistress, to whom she had given up her farm, and continued with him until her death, he gained no settlement in another parish by serving another person with the son's consent, given after his mother's decease. *Rex v. Sheepshead*, 15 East, 59.

(e 4) *Example of express consent.*

If a master, on retiring, desires his apprentice to go to J. S. (in the same business as himself) who he understood wanted a man, and make an agreement for his own good, and the indentures are not given up to the apprentice until he has served forty days with his new master, such service is with the express consent of the first, and, as the apprenticeship continued until the indentures were given up, confers a settlement. *Rex v. The Inhabitants of the Parish of the Holy Trinity in the Minories*, 3 T. R. 605.

(e 5) *Example of particular consent.*

A pauper two months previous to the expiration of his apprenticeship, had agreed with S. his master, to cancel the indentures, upon a condition which did not take effect; and the indentures were neither cancelled nor given up. On the morning on which the agreement was concluded, the pauper went to B. and offered to serve him, who said, that he would not take him without the consent of S. The pauper went to S. and told him what B. had said; S. replied, "you may go with all my heart, I think it will be a good thing for you to learn the trade." Held a particular assent. *Rex v. Shebbear*, 1 East, 73.

(e 6) *Examples of general consent.*

1. The master told the apprentice, that he had no further employment for him, and he might go where he pleased. Afterwards, as he was going out of the house, the master asked him where he was going; he said, to X; the master said, that he

might go there, or where he pleased. Held, that this was only a general consent. *Rex v. Crediton*, 1 East, 59.

2. The master of an apprentice bound by indenture, tells him that he might leave him if he liked, and shift for himself; the apprentice accordingly leaves him, and is bound to a second master. His service with such second master, cannot be considered a service under the indenture to the first, since to this end some particular person should have been named by the first. *See* *Rex v. Inhabitants of Bow*, otherwise *Nymett Tracey*, 4 M. & S. 383.

(e 7) *Example of what is not an assent.*

An apprentice was assigned by parol to his brother W. C., a journeyman bricklayer. Being about to marry, he applied to W. C., and told him he wished to work, and provide for himself, to which W. C. consented, and said, he might do the best he could for himself, and did not afterwards consider the pauper as his apprentice. But the indenture was neither delivered up nor cancelled, nor any thing said respecting it. In the same month, and three-quarters of a year before the expiration of the apprenticeship, the pauper applied for work to T. P., who employed him in bricklayer's work at weekly wages. About a month after, T. P. met W. C., and told him he had got his brother at work, to which W. C. replied, "I am glad of it, he was a bad lad, and I could make nothing of him." Held not an assent. *Rex v. St. Helen, Stonegate*, 1 East, 285.

(e 8) *Of stamping the assent when in writing.*

The assignment, when in writing, must be stamped, not being within the exception of any memorandum or agreement for the hire of any labourer, &c. *Rex v. St. Paul's Bedford*, 6 T. R. 452.

(f) *Of the residence by and place in which an apprentice acquires a settlement.*

(f 1) *General rule.*

An apprentice, or a servant, is settled where he sleeps the last night in his condition of an apprentice, provided he has resided there forty days altogether. *Rex v. Brighthelmstane*, 5 T. R. 188; *Rex v. Uxbridge*, 5 T. R. 387.

(f 2) *Quality of the residence.*

An apprentice must reside in the place in which he seeks a settlement, subject to the binding power of his indenture, and the controul of his master. *Rex v. Topsham*, 7 East, 466; *Rex v. Smarden*, 13 East, 452.

(f 3) *Rule in the case of an apprentice to a sea captain.*

It makes no difference whether an apprentice to a sea captain inhabit on land, or on ship-board, if the place in which the vessel lies is within a town or parish. *Rex v. Topsham*, 7 East, 466; 3 Smith, 457.

(f 4) *Rule where the apprentice resides in another parish, from sickness.*

An apprentice living in a different parish from his master through illness, is settled where he resides, provided he performs any service for his master, either there or elsewhere, during his residence therein. *Rex v. Stratford-upon-Avon*, 11 East, 176.

(f 5) *Examples.*

1. Where the pauper, apprenticed to the master of a small trading vessel, had slept more than forty nights at S., but slept the last night of his service at B., and had slept there previously more than forty nights at his grandmother's, in consequence of being ill of a fever, and was received back by his master. Held, that he was not settled in B; the residence, except for the last night, being only in consequence of sickness. *Rex v. Barmby*, 3 Smith, 375; 7 East, 381.

2. A pauper, apprenticed to a mariner at Topsham, to serve on board a ship trading from Poole to Shields, is at Poole with the vessel in the course of his service, where his master becomes a bankrupt, and the service is terminated, and there resides more than forty days sleeping on board the vessel. Held, that he gains a settlement at Poole. *Rex v. Topsham*, 3 Smith, 457; 7 East, 466.

3. The mere fact of an apprentice returning into his master's parish, having left him with consent, and sleeping there unknown to his master, without either returning in fact into his master's service, or even having any intention to do so; but, on the contrary, where it is found that he had no such intention, cannot be coupled with a former service in the

same parish, so as to get rid of an intervening settlement acquired in another parish. *Rex v. Smarden*, 13 East, 452.

4. A boy, at the age of seventeen, is bound apprentice by indenture, dated and Nov. 1790, for six years. During the first two years he sleeps at X. He is then sent by his masters to work for them at Y., where he sleeps, except that on Saturday and Sunday nights, he sleeps at his mother's at X, returning to Y. on the Monday, which is known to the master. This continues for two years more, so that he is now twenty-one. About a quarter of a year after, one Saturday, he receives his pay, and never returns to his master's service. On the Friday preceding, he slept at Y. He had not formed the intention not to return when he quitted, according to his own account. Held, that his service, under the indenture, ceased when he quitted on the Saturday, so that his settlement was at Y, where he slept the last night of his serving under them; for, 1. either the circumstance of his never returning gave a character to the original act of departure, and shewed the intention which directed it; or, 2. when he left the service, on the Saturday, he received his wages up to that time, and after that time he never received any more; therefore, he never was again in his master's service after the time he left it. *Rex v. Inhabitants of Ribchester*, 2 M. & S. 135.

(g) *Of discharging the apprentice from his indenture by consent.*

(g 1) *General rules.*

1. The indentures may be cancelled, and the apprenticeship dissolved, with the consent of all parties; namely, if the apprentice is under the age of twenty-one, an agreement between the master, apprentice, and father, or guardian, or in case of a parish apprentice, with the assent of the parish-officers; but if the apprentice is of full age, it may be dissolved by an agreement between him and the master only, without the intervention of any other person. B. S. C. 441, 562, 766.

2. An apprentice is incompetent to engage himself with a new master, so long only as the former apprenticeship continues; if that be put an end to, he is again *sui juris*. Now, an apprenticeship, under an indenture, (here the apprentice

and master alone were parties,) may be discharged with mutual consent of the master and the apprentice, provided it is for the benefit of the apprentice, being an infant, that it should be put an end to, but not otherwise; and it is for his benefit that this should be done when the master has become incapable of instructing and providing for him; as where he has ran away and deserted the apprentice. *Rex v. The Inhabitants of Mountsorrel*, 3 M. & S. 497.

3. To decide whether an apprenticeship, under an indenture, has been put an end to, the rule is this: If the circumstances are a defence to an action of covenant brought upon the indenture, it has been; otherwise not, even though equity would give relief. *Rex v. The Inhabitants of Harberton*, 1 T. R. 139.

(g 2) *Cancelling or delivering up the indenture, how far essential to.*

1. That an apprenticeship may be put an end to, it is not essential that the indentures should be delivered up. *Rex v. The Inhabitants of Harberton*, 1 T. R. 139.

2. If an apprentice is bound to a second master before his apprenticeship to the first is put an end to, not being *sui juris*, and, therefore, incompetent to contract for his service, he cannot gain a settlement by serving with the second; and if the first binding was by deed, and a parish apprenticeship, it cannot be discharged by the master telling the apprentice that "he might leave him and go where he liked, and shift for himself." *Rex v. Inhabitants of Bow, otherwise Ny-mett Tracey*, 4 M. & S. 383.

3. An apprentice, under age, entered a volunteer in his majesty's service, "with his master's consent." He never returned to his master, but the indentures were not delivered up nor cancelled. The apprenticeship continues. *Rex v. Hindingham*, 6 T. R. 557.

(g 3) *Cancelling or delivering up the indenture, whether conclusive.*

In deciding whether an apprenticeship has been put an end to, it would originally have been better to say, that the mere fact of cancelling or delivering up the indenture, should be conclusive evidence of its termination, without (as is the settled rule) as to the motives whence the

act proceeded. *Rex v. The Inhabitants of Harborton*, 1 T. R. 139.

(g 4) *Of conditional consent.*

1. If the master agrees to cancel the indentures conditionally, they remain in force until the apprentice performs the condition, although he is treated in the interim as one *sui juris*, uncontrolled by the obligation of his indentures. *Rex v. Chipping-Warden*, 8 T. R. 108.

2. An apprentice who was assigned to S, proposed to S, two months before the expiration of his apprenticeship, to let him off the remainder of his time, which he at first refused to do. The pauper then offered to give S. a guinea, if he would let him off, which S. agreed to do, and also to give him a new suit of clothes when the guinea was paid; the guinea was not paid; nor did S. give the pauper the clothes, nor were the indentures given up or cancelled. Held, that the apprenticeship continued. *Rex v. Shebbear*, 1 East, 73.

(h) *Of the proofs necessary to establish this settlement.*

1. If, by any indentment, an indenture of apprenticeship, in the manner in which it is executed, might be sufficient, it lies on the party disputing its validity to impeach it by evidence. *Rex v. Hinckley*, 12 East, 361.

2. An indenture executed thirty years ago, was proved to have been delivered to the apprentice at the expiration of his time, and lost. The parish, in which he was settled by service under it, had relieved and otherwise treated him as a parishioner, for the last twelve years previous to the appeal. Held, that the indenture might be presumed to have been regularly enrolled and stamped, although it was proved by the deputy-register, and comptroller of the apprentice duties, that it did not appear that such an indenture had been stamped with the premium stamp, or enrolled from the time of the date to the present time. *Rex v. Long Buckby*, 7 East, 45; 3 Smith, 92.

IV. OF SETTLEMENT UPON A TENEMENT OF TEN POUNDS A YEAR VALUE.

(a) *Of the kind of tenement.*

(a 1) *A cattle gate.*

A cattle gate in Yorkshire is a tenement
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within the statute 13 and 14 Car. II, c. 12. It gives to the owner, not a right of common merely, but a property in the soil; it passes by lease and re-lease; and can only be devised with the formalities prescribed by the Statute of Frauds. *Rex v. The Inhabitants of Whixley*, 1 T. R. 137.

(a 2) *A common in gross.*

A common in gross, is a tenement within the statute. *Rex v. Dersingham*, 7 T. R. 671.

(a 3) *A dairy.*

Renting a dairy of cows, to be fed in particular pastures, with exclusive right, gains a settlement. *Rex v. Tolpuddle*, 4 T. R. 671.

(a 4) *A several fishery.*

A several fishery is a tenement within the statute, 9 and 10 W. III, c. 11 (Certificate Act.) *Rex v. The Inhabitants of Old Alresford*, 1 T. R. 358.

(a 5) *Fogs, or after-grass.*

The fogs, or after-grass of a meadow, are a tenement. *Rex v. Brampton*, 4 T. R. 348.

(a 6) *A local franchise or privilege.*

A right to the enjoyment of a local privilege or franchise is not a tenement. *Rex v. Warkworth*, 1 M. & S. 473.

(a 7) *The milking and pasturage of cows.*

Renting the hire or privilege of milking two cows belonging to another, at so much per week per cow, for forty weeks, which cows were to be depastured by the owner on his farm, in common with his other cattle, and were to be milked by the pauper, confers a settlement. *Rex v. Stoke upon Trent*, 10 East, 496.

(a 8) *A pointing place.*

An agreement to have the use of any two pointing places in a mill, confers no settlement. *Rex v. Dodderhill*, 8 T. R. 449.

(a 9) *A post windmill.*

A post windmill, not let into the freehold, built by the tenant, with liberty from the lord to remove it at pleasure, is not a tenement. *Rex v. Lenthorpe*, 6 T. R. 377.

(a 10) *The profits of land.*

1. A grant of the profits of the land carries the land itself; thus, a lease of the hay-grass and aftermath of a meadow; which, therefore, is a tenement within the statute 13 & 14 Car. II, c. 12. *Rex v. The Inhabitants of Stoke*, 2 T. R. 451.

2. A right to take the herbage by the mouths of one's cattle, though hired for the purpose, though not exclusive is a tenement. *Rex v. Hollington*, 3 East, 113; *Rex v. Stoke upon Trent*, 10 East, 496; *Rex v. Darley Abbey*, 14 East, 280.

(a 11) *A rabbit warren.*

A rabbit warren, with a cottage upon it, although the tenant have no right in the soil of the warren, except that of entering upon and killing the rabbits there, is a tenement. *Rex v. Piddletrenthide*, 3 T. R. 772.

(a 12) *Runners for needles.*

The exclusive use of runners for securing needles, &c. and a packing-room, at 1s. per packet, is not a tenement. *Rex v. Tardobigg*, 1 East, 528.

(a 13) *A standing place for carding.*

A standing place in a mill for a carding machine, is no tenement. *Rex v. Mellor*, 2 East, 189.

(a 14) *Tolls.*

1. The tolls of a market are a tenement within the statute. *Rex v. Clipping Norton*, 5 East, 239; 1 Smith, 502.

2. Tolls are not less a tenement, from the shares of the proprietors being made personal estate. *Rex v. Bubwith*, 1 M. & S. 514.

(a 15) *Different tenements in the same or different parishes.*

1. Residing in a tenement in one parish, of which possession was obtained under a treaty to purchase, and occupying his own freehold property in another, gives a settlement. *Rex v. Culmstock*, 6 T. R. 780.

2. The party must actually occupy the premises sought to be united; for, an occupation, as tenant, in one parish, cannot be coupled with an interest as landlord in another. *Rex v. South Benfleet*, 1 M. & S. 154.

(a 16) *Under the general Turnpike Act.*

1. The statute 13 Geo. III, c. 84, s. 56, only means that no person of the description therein mentioned, shall gain a settlement by keeping the gate, or renting the tolls, and residing in the toll-house. *Rex v. Denbeigh*, 5 East, 333; 1 Smith, 506.

2. A person renting the tolls, and residing in the turnpike-house erected under the Durham paving, &c. act, 30 Geo. III, c. 67, is within the prohibition in the general turnpike act, 13 Geo. III, c. 84, s. 56. *Rex v. Elvet*, 11 East, 93. See *Rex v. Bubwith*, 1 M. & S. 514.

(a 17) *Under the Clapham Act.*

By statute 51 Geo. III, c. 107, "for the better assessing and collecting the poor and other parochial rates of the parish of Clapham," it is enacted "that where the yearly rent or value of any house, tenement, or hereditament within the said parish, shall not amount to 20 l., or where any house, &c. (whatsoever the yearly rent or value may be,) shall be let to any weekly or monthly tenants, the rent whereof shall become payable at any shorter period than quarterly, or shall be let out in whole or in part, as lodgings; then the churchwardens and overseers may compound with the landlord or owner of all such houses, &c. for the payment of the poor rates, and all other parochial rates, at a reduced rental. And, if the landlord shall refuse to compound, he shall be deemed the occupier, and shall be rated and pay the same, and his goods, and also the goods of his tenant, shall be distrained for the same, and the tenant shall deduct the same. Provided, also, that no tenant or occupier of any house, &c. as before-mentioned, shall, by reason of his residing in, or occupying of the same, or by his payment of any such rate in manner aforesaid, be deemed to acquire any settlement in the said parish; but, in every such case, the landlord or owner of the premises, shall be deemed and considered to have paid the same." Question—Whether this proviso applies generally to any tenant whatsoever, or to the tenants of such houses as, &c.? Held, that it applied to the latter only; it plainly appearing that "any tenant," meant "such tenant." *Rex v. Inhabitants of Streatham*, 2 M. & S. 468.

(b) *Of the value of the tenement.*

(b 1) *General rules.*

1. The worth, at the time when the tenant enters, is immaterial, provided it is sufficient during any year of his occupation; and the manner in which it becomes of that value, is equally immaterial. *Rex v. Purley*, 16 East, 126.

2. To gain a settlement by tenure, the yearly value must continue during the whole forty days of residence, of 10*l.*; it is not sufficient, that being of that value at the first, it fell short of it before the forty days expired. Therefore, where a party, renting a house, &c. of the annual value of 4*l.*, purchased a growing crop of oats in the same parish for 12*l.* 14*s.* which he began reaping about a month after the purchase: Held, that, even admitting that this was a tenement competent to gain a settlement, yet, as the value began to decrease before forty days from the purchase, and it did not appear that what remained on the last of those days, was sufficient, adding to it the house, &c. to make up the 10*l.*, he did not gain one. *Rex v. Inhabitants of Bowness*, 4 M. & S. 210.

3. If the value of land is increased by cultivation, previous to the occupation, and by reason of an agreement to that effect, it confers a settlement. *Rex v. Ringwood*, 1 M. & S. 381.

(b 2) *Value, how estimated.*

1. The value of the tenement is estimated by what it will produce by a letting, for the whole year. *Rex v. Helkingsly*, 10 East, 41.

2. The value of the tenement may be calculated, without deducting taxes, rates, and charges, usually deemed tenants' taxes. *Rex v. St. Paul's, Deptford*, 13 East, 320.

(b 3) *Rule, where the tenement is a dairy.*

In the case of renting a dairy, the value of the cows cannot be taken into consideration as forming part of the value of the tenement. *Rex v. Minworth*, 2 East, 198.

(b 4) *A case where the land was taken ready ploughed and manured.*

A pauper agrees to take land, to be ready ploughed and manured, at 10*l.* and

upwards per annum. The value of the land, without ploughing and manuring, is under 10*l.*; but with it, of the stipulated price. Held, that as no part of the sum was agreed to be paid for the labour, the whole was referrible to the land itself. The lease was of land, of such a value, no matter by what means it was raised to that value. *Rex v. Inhabitants of West Cramore*, 2 M. & S. 132.

(c) *Of the occupation, or coming to settle upon a tenement.*

(c 1) *Must be as a tenant.*

1. Before a party can be said to come to settle on a tenement, there must be something like a taking of it as a tenant. *Rex v. Inhabitants of Seacroft*, 2 M. & S. 473.

2. That a settlement may be acquired by tenure, the tenement must be holden by the party as a tenant, and not as an accessory, to some other principal thing, and for its more convenient use and enjoyment; therefore, where A. engaged himself as waiter at an hotel, having the tap, that is, the privilege of selling malt liquors there, and the use of a cellar belonging to the hotel, for holding the liquors, which had a distinct and separate entrance, and of which he kept the key, and paid a yearly sum for the tap and cellar. Held, that this mode of occupying the cellar, was not sufficient to gain a settlement. *Rex v. Inhabitants of Seacroft*, 2 M. & S. 472.

3. The words of the statute 13 and 14 Car. II, c. 12, "shall come to settle in," mean "shall hold, in the character of tenant." The 9 and 10 W. III, c. 11, shews that it was so understood by the legislature of that day, for that enacts, that "no person who shall come into a parish by certificate, shall gain a settlement therein, unless he shall take a lease of a tenement of the value of 10*l.*, &c.; therefore, the purchase of a growing crop for a sum exceeding 10*l.*, does not confer a settlement. Per Lord Ellenborough. *Rex v. Inhabitants of Bowness*, 4 M. & S. 210.

4. If another person is the actual occupier or tenant of the premises, a mere permission to use the premises, in a subordinate condition, does not confer a settlement. *Rex v. St. Michael's in Coventry*, 15 East, 567.

(c 2) *Of an occupation under a treaty of purchase.*

Residence, under a parol treaty, for purchase, which goes off from defect of title, is a coming to settle within 13 and 14 Car. II. *Rex v. Culmstock*, 6 T. R. 730.

(c 3) *Must be bona fide.*

1. A fraudulent renting of a tenement, will not confer a settlement. *Rex v. The Inhabitants of Woodland*, 1 T. R. 261.

2. If a man who is insolvent, has conveyed his estate to trustees for the payment of his debts, and afterwards, before the trust is performed, gets fraudulently into possession, he will not gain a settlement by residing forty days. *Rex v. St. Michael's*, Dougl. 630.

(c 4) *Title of the lessor,—whether material.*

Renting a tenement, though the lessor has no title, confers a settlement. *Rex v. The Inhabitants of Old Alresford*, 1 T. R. 358.

(c 5) *Title of the lessee,—whether material.*

1. No interest in tolls can pass unless by deed, being things incorporeal; and if they belong to a corporation, such grant must be under the corporate seal. Therefore, where the tolls of a bridge owned by a corporation, were demised for a year by indenture, by five persons therein described as members of a committee appointed for managing the affairs of the bridge, but the seals were their private seals; held, that the lessee did not, by holding them above forty days, gain a settlement; and that his having paid rent for them made no difference, since, though such payment would have made him tenant had the subject matter been land, yet being a thing lying only in grant, it could not. *Rex v. Inhabitants of North Duffield*, 3 M. & S. 247.

2. A pauper rented a tenement of 8 l. 10 s., and also the tolls of a market, which he took of the corporation, to whom they belonged, at a court leet, by verbal agreement.—Held, that the demise not being by deed, the pauper had not a good legal title to the toll, and so did not gain a settlement. *Rex v. Chipping Norton*, 1 Smith, 502; 5 East, 239.

(c 6) *Reservation of rent,—whether material.*

Taking a tenement at will of the requisite value, for which the pauper is to pay nothing, from want of ability to pay, is a coming to settle within the stat. 13 & 14 Car. II, c. 12. *Rex v. The Inhabitants of Tillongley*, 1 T. R. 458.

(c 7) *Ability to pay the rent reserved,—whether material.*

It is immaterial that having contracted to pay rent, he is unable to pay it. *Rex v. Denbigh*, 5 East, 333; 1 Smith, 506; *Rex v. Hooe*, 4 East, 36, n.

(c 8) *The circumstance of the rent being guaranteed,—whether material.*

It is immaterial that the payment of the rent is guaranteed to the landlord by some other person. *Rex v. Hooe*, 4 East, 362.

(c 9) *Community of occupation amongst several,—whether material.*

1. It is immaterial that the tenement is jointly occupied by more tenants than one, provided it be sufficient in value. *Rex v. Seamer*, 6 T. R. 554.

2. The number and connexion of the tenants forms no consideration in the question of settlement. *Rex v. Dorstone*, 1 East, 296.

(c 10) *Of occupation as a servant.*

1. A servant who occupies a tenement of the requisite value, not that he may more conveniently serve his master, but as wages or recompence for his services, thereby gains a settlement. *Rex v. The Inhabitants of Melkridge*, 1 T. R. 598.

2. If a profit issuing out of land of the yearly value of 10 l., is held by a servant of his master, not for the better and more convenient performance of his service to the master, such holding (other essentials concurring) confers a settlement. Nor need the return be by rent; a return in service is sufficient. The occupation of apartments in the master's house by servants, is for the better discharge of their duty towards him. *Rex v. Inhabitants of Minster*, 3 M. & S. 276.

(c 11) *Of occupation as a wife.*

The pauper must stand in the relation of tenant to the property during the forty

days' residence. A wife therefore cannot acquire a settlement by residence in her husband's life-time, on a tenement taken by him. *Rex v. St. George the Martyr*, 7 T. R. 466.

(c 12) *Of occupation by an executor.*

The executor of a tenant from year to year of a tenement under 10 *l.* per annum, gains a settlement by residence. *Rex v. Stone*, 6 T. R. 295.

(c 13) *Of occupation by the husband of a devisee under a will not proved.*

The pauper resided on a tenement with his father-in-law, of the yearly value of 11 *l.* The father-in-law having received six months' notice to quit, died three months afterwards, leaving 5 *s.* to each of his other children, and giving the rest of his property and stock upon his tenement, of the value of upwards of 40 *l.*, to the pauper's wife, and appointing her executrix. The pauper paid his brother and sister-in-law their legacies. He never proved the will, but continued to occupy the tenement with his wife for three months, until the expiration of the notice, and paid the rent. His children got the will and tore it in pieces.—Held he gained a settlement. *Rex v. Netherseal*, 4 T. R. 258.

(c 14) *Of occupation by a deserter under his wife's contract.*

Where the wife of a deserter, without her husband's knowledge, and without discovering that she is a married woman, rents a tenement of the value of 10 *l.* per annum, and the husband afterwards comes and conceals himself in the house to escape detection; he does not, by such a residence for forty days, gain a settlement, since such a residence, with such a motive, cannot be considered as an adoption by him of his wife's contract. The intention upon his part, the communication of it to the landlord and the concurrence of the latter (*sed quare* if the last be essential) and the *animus residendi* are all wanting. *Rex v. Inhabitants of Ashton-under-Lyne*, 4 M. & S. 357.

(c 15) *Of occupation by an alien.*

An alien, if any, may acquire a settlement by occupying a tenement of 10 *l.* per annum. *Rex v. Eastbourne*, 4 East, 103.

(c 16) *Examples of occupation within the statute.*

1. A house consisted of two separate tenements, one of which the pauper occupied with his family, together with a barn, stable, and yard appurtenant. He never paid any rent to his relation in respect of them, but the relation had all the manure made by the pauper's cattle, and spread it upon his own lands in an adjoining parish. This person occupied a tenement within the statute. *Rex v. Fritwell*, 7 T. R. 197.

2. Residence by the owner of a freehold estate with his tenant, as a lodger, to conduct alterations in the premises, gives him a settlement. *Rex v. Houghton-le-Spring*, 1 East, 247.

(d) *Of the residence.*

(d 1) *Duration of.*

A residence of forty days is absolutely necessary. *Rex v. Llanbedergoch*, 7 T. R. 105; *Rex v. St. George the Martyr*, 7 T. R. 466.

(d 2) *Of the temporal limit.*

A residence for forty days to confer a settlement, must be within a year's compass. *Rex v. Denham*, 1 M. & S. 221.

(d 3) *Place where.*

1. To gain a settlement, there must be a residence either upon the premises, or at least in the parish where some of the premises lie. *Rex v. The Inhabitants of Knighton*, 2 T. R. 48.

2. It is enough if he dwell where part of the tenement lies. *Rex v. Fritwell*, 7 T. R. 197; he need not reside upon any part of what he takes. *Rex v. Llandverras*, Burr. S. C. 572.

(d 4) *Quality of.*

In order to gain a settlement by residing on a tenement of the yearly value of 10 *l.*, the party must stand in the relation of tenant to the property for forty days. *Rex v. South Lynn*, 5 T. R. 667.

(d 5) *In the case of several tenements, or situation in several parishes.*

If the party has a tenement, or tenements of sufficient value, situated in different parishes, and has resided in both, he is settled where he slept the last night of his occupation, provided he has slept

there forty nights in all. And it makes no difference that the tenement in that parish is of the lesser value, or only an occasional residence, taken for a particular purpose, and that the party's regular home, and the residence of his family, is in the other parish. *Rex v. St. Mary, Lambeth*, 8 T. R. 240.

V. OF SETTLEMENT BY ESTATE.

(a) *Of the estate necessary to confer a settlement.*

(a 1) *General rules.*

1. As the foundation of the settlement is the party's interest in the premises, he must have either a legal or an equitable title to an interest in possession. *Rex v. Chailey*, 6 T. R. 755; *Rex v. South Lynn*, 5 T. R. 667.

2. An estate in remainder or reversion, does not confer a settlement, any more than one in contingency or expectation. *Rex v. Easington*, 4 T. R. 117.

(a 2) *Duration of the interest.*

It is sufficient if the interest continues during a residence of forty days. *Rex v. Doistone*, 1 East, 296.

(a 3) *An equitable estate, whether sufficient.*

1. An equitable interest in land is sufficient to enable the party to gain a settlement, where a court of equity would decree a specific performance. *Rex v. The Inhabitants of Lopen*, 2 T. R. 577; *Dougl. 631*; *Rex v. Wivelingham*, *Dougl. 767*.

2. An equitable estate is sufficient to confer a settlement; as where the title is in trustees. So, by a residence on such an estate settled to the wife's separate use, the husband gains a settlement. *Rex v. The Inhabitants of Offchurch*, 3 T. R. 113.

3. An estate being devised to trustees to be sold to pay debts, and to divide the surplus, if any, between A, B, and C; A. has an equitable interest in the estate, and by residing on it forty days gains a settlement. *Rex v. Wivelingham*, *Dougl. 767*.

4. The pauper's father purchased a cottage and land for less than 30*l.* and died, having devised by will this estate, being under the annual value of 10*l.*, to a trustee, to let it to farm during the pauper's natural life, and pay the rents thereof to her, deducting the expenses; and after her death

in trust for the use of his right heir. The pauper gained a settlement, by residence, after her father's death, the trustee never having interfered. *Rex v. Holm East Waver Quarter*, 16 East, 127.

5. What shall be a possession in the character of *cestui que trust*, so as to confer a settlement. *Rex v. Owersby le Moor*, 15 East, 356.

(a 4) *Need not be beneficial.*

The interest in the estate need not be beneficial. *Rex v. Stone*, 6 T. R. 295.

(a 5) *An estate by estoppel, whether sufficient.*

One entitled by estoppel to possession of land, gains a settlement by residence thereon. *Rex v. The Inhabitants of Lopen*, 2 T. R. 577.

(a 6) *An estate by licence or acquiescence, whether sufficient.*

1. Occupation by leave of the tenant in possession, gives a settlement. *Rex v. Aldborough*, 1 East, 597.

2. *Semble*, that residence acquiesced in by all interested in disputing the possession with the pauper, gives a settlement. *Rex v. Culmstock*, 6 T. R. 730.

3. The grant, by court roll, of a "license," by the lord of a manor, to build a cottage upon land and inclose land, paying so much per annum, as a quit rent, does not pass any interest in the land; it amounts neither to a grant nor to a lease, but merely to a license revocable at will. Such grant, therefore, with residence for the prescribed time, does not confer a settlement. *Rex v. Inhabitants of Hornorton-the-Hill*, 4 M. & S. 562.

4. A son agrees to purchase a piece of land; his father advances him part of the purchase-money, upon parol condition, that the son should build a house upon the land which the father and mother were to have, gratis, for their lives, and the life of the survivor, and afterwards to go to the son; but the father and mother were not to dispose of it, nor take any other family into the house. The land is conveyed to the son in fee, who builds a house in which the father and mother reside. Held, that no settlement could be gained by residence under this agreement, since being by parol, the father had no interest in the house, but resided

therein under a mere license. *Rex v. Inhabitants of Standon*, 2 M. & S. 461.

(a 7) *An estate by descent.*

An estate to which the party is entitled by descent, will always confer a settlement, without regard either to the annual or total value of the interest. *Rex v. Great Farringdon*, 6 T. R. 679.

(a 8) *An estate to which the party is entitled as dower, or next of kin.*

1. Persons entitled to administration, or dower, who reside on the estate, without administration granted, or dower assigned, do not gain a settlement. *Dougl. 631.*

2. A person, though solely entitled to administration, if the whole would not thereby have vested in him for his own use, does not gain a settlement by a residence of forty days on premises held for a term of years determinable on lives. *Rex v. North Curry*, *Dougl. 770, n.*

3. A sole next of kin has such an equitable interest in an intestate's leasehold property, as will confer a settlement before administration granted. *Rex v. Horsley*, 8 East, 405.

(a 9) *An estate held as guardian.*

A guardian in socage acquires a settlement, and also a subsequent husband in her right. *Rex v. Oakley*, 10 East, 491.

(a 10) *An estate held as mortgagor.*

A mortgagor may gain a settlement, whether the conveyance be in the form of an absolute disposition in trust, or of a mortgage. *Rex v. Edington*, 1 East, 288; *Dougl. 632.*

(a 11) *Example of an estate sufficient.*

A, previous to her marriage with B, who is seised of a copyhold for his life, which, by the custom of the manor, his widow will be entitled to a free-bench, executes a bond to give up to C. part of the premises to which she will be entitled on surviving her husband; she survives, and gives up possession in pursuance of the bond. Held, that C. had not only an equitable title under the bond, but a right of possession of which the widow could not divest him by ejectment, and therefore, that he gained a settlement by resi-

dence upon the premises. *Rex v. The Inhabitants of Lopen*, 2 T. R. 577.

(a 12) *Examples of estates insufficient.*

1. The pauper was entitled to the equity of redemption of several houses mortgaged by his father, of which the mortgagee had recovered possession in an ejectment brought against the pauper. He afterwards obtained leave to inhabit one of the houses which was untenanted, for the purpose of overlooking some repairs which he proposed to do upon the estate, with an intention to sell the same, and pay off the mortgage. He resided three months, and did nothing either towards the repairs or the sale. He gained no settlement, for he had neither *jus in re* nor *ad rem*. *Rex v. Catherington*, 3 T. R. 771. See *Rex v. Houghton-le-Spring*, 1 East, 247.

2. An estate in fee descended to a married woman, who died without either herself or husband making an entry on the premises, or receiving the rents or profits. The husband gained no settlement by residence after her death, for the heiress did not reduce the estate into possession; and in order to make the husband tenant by the curtesy, there must be a seisin in fact in the wife. *Rex v. Great Farringdon*, 6 T. R. 679.

(b) *Of settlement by purchase, under 9 Geo. I, c. 7.*

(b 1) *General rules.*

1. To make a purchase within the stat. 9 Geo. I, the sum of 30*l.* must be actually and *bond fide* paid. Hence, a purchase at 37*l.* of an estate, mortgaged for 30*l.* with the payment of 7*l.* only, is not such. *Rex v. The Inhabitants of Mattingley*, 2 T. R. 12.

2. That is not a purchase within the statute, where less than 30*l.* is paid down, and the premises mortgaged to the vendor for the residue. *Rex v. Olney*, 1 M. & S. 387.

3. The stat. 9 Geo. I, c. 7, s. 5, restrains the gaining of settlements by estates acquired by purchase for less than 30*l.* *Quære*, whether it means exclusively a purchase, amounting to 30*l.* made at one time? *Rex v. Inhabitants of Wilby*, 2 M. & S. 504.

(b 2) *What purchases are not within the statute.*

1. A devise is not a purchase within

9 Geo. I. c. 7. *Rex v. Wivelingham*, Dougl. 767.

2. A conveyance from father to son, in consideration of natural love and affection, and of 10*l.*, the value of the tenement being above 10*l.*, is not a purchase within stat. 9 Geo. I. c. 7, which applies to pecuniary purchases only. *Rex v. The Inhabitants of Upton*, 3 T. R. 251.

3. A. purchases a copyhold for 60*l.* mortgaged for 50*l.*; he borrows 50*l.* from B. to pay it off, and then surrenders the premises to secure the money lent by B. and afterwards sells the estate for 80*l.* The purchase is not within the act. *Rex v. Chailey*, 6 T. R. 755.

4. An attainted felon discharged under the sign manual, acquired a settlement for himself and his unemancipated child, by purchasing a copyhold for more than 30*l.* upon surrender formally made, and upon which he had subsequently resided, and received the issues and profits for nine years. *Rex v. Haddenham*, 15 East, 463.

(b 3) *What purchases are within the statute.*

1. A. purchased a leasehold for less than 30*l.*, and afterwards conveyed the interest in trust, 1. To pay debts: 2. To wife's separate use: 3. To his own use, if he survived her; remainder to her children. A. gained no settlement by subsequent residence thereon. *Rex v. Tarrant Launceston*, 3 East, 226.

2. *Semble*, that if an estate is purchased by the husband when sole, for less than 30*l.*, and settled, after marriage, in trust to the wife's separate use, he cannot gain a settlement by reason of the equitable estate vested in his wife. *Rex v. Tarrant Launceston*, 3 East, 226.

3. Where the dean and chapter had granted a lease for lives to the pauper's grandfather, and after the expiration of the lease, the dean and chapter, on the pauper's application, and on payment by him of a sum of two guineas, granted a new lease of the premises in question, at a new rent of 1*s.* to hold to the pauper, his heirs and assigns, for three lives; considered to be a purchase under 30*l.* within the statute. *Rex v. Martley*, 5 East, 40; 1 Smith, 344.

(c) *Of the residence.*

The residence must be while the estate

continues vested in the person claiming a settlement. *Rex v. Horsley*, 8 East, 405.

(d) *Of the proofs necessary to establish this settlement.*

(d 1) *General rule.*

The same strictness of proof is not required to ascertain a title to an estate in cases of settlement, as would be necessary in ejectment. *Rex v. Butterton*, 6 T. R. 554.

(d 2) *Presumption arising from possession.*

If a father resides in a house as owner, for twenty years, the settlement thereby gained is communicated to his children, notwithstanding they quitted him in the intermediate time, for instance, at the expiration of fifteen years; for the presumptions are, that the possession originated under a valid title, and, therefore, that he was the rightful owner when his children left him. *Rex v. Inhabitants of Calow*, 3 M. & S. 22.

VI. OF SETTLEMENT BY SERVING AN OFFICE.

(a) *Of the kind of tenement.*

(a 1) *General rules.*

1. The office or charge must be a public institution. The exercise of a private employment confers no settlement, although ever so notorious in the parish. *Rex v. Whittlesea*, 4 T. R. 807.

2. The stat. 3 W. III. c. 11, s. 6, is confined to inferior annual officers, such as constables, and the like. *Rex v. Wantage*, 2 East, 65.

(a 2) *Ale-taster.*

The office of ale-taster of a borough confers a settlement. *Rex v. Bow*, 8 T. R. 445.

(a 3) *Constable.*

The office of constable is a parish officer within 10 & 11 W. III. c. 23. *Mosely v. Stonehouse*, 3 Smith, 181; 7 East, 174.

(a 4) *Curate.*

The office of curate is not an office within the statute. *Rex v. Wantage*, 2 East, 65.

(a 5) *Hog-ringer.*

The office of hog-ringer for the parish, —the duty being to attend the open com-

mons, to see that all hogs turned thereon are rung, and to impound such as are not, the officer receiving one penny for impounding, and sixpence for ringing each hog; being an office of great antiquity, and serviceable to the inhabitants of the parish, was held to confer a settlement. *Rex v. Whittlesea*, 4 T. R. 807.

(a 6) *Sexton.*

The office of sexton is a public office, within the statute 3 W. & M. c. 11, s. 6. And a sexton appointed to a church, of which the yard lies in two different parishes, but the church in one only, gains a settlement in which ever parish he resides. *Rex v. The Inhabitants of Liverpool*, 3 T. R. 118.

(a 7) *Master of a workhouse.*

A master of a workhouse, appointed in vestry, has not a public office or charge, under 3 & 4 W. III, c. 11, s. 6, to gain a settlement. *Rex v. Mersham*, 3 Smith, 151; 7 East, 167.

VII. OF SETTLEMENT BY PAYMENT OF TAXES.

(a) *General rules.*

(a 1) *In relation to the case where parishes are incorporated.*

Where parishes are incorporated, for the purpose of maintaining their poor out of one joint fund, they remain distinct for all others. *Rex v. St. Michael's at Thorn*, 6 T. R. 536; *Rex v. Wymondham*, Id. 552.

(a 2) *Operation of statute 35 Geo. III, c. 101, s. 4.*

The statute 35 Geo. III, c. 101, s. 4, extends to inhabitants at the time it passed. *Rex v. Islington*, 1 East, 283.

(b) *Of the rating.*

(b 1) *Form of.*

1. When the title of the poor-rate is—"so much in the pound," and the pauper's name is inserted in the rate, and also his yearly rent, and he pays at the rate of 2 s. in the pound for his specified rent, though nothing is written against his name in the column of "sums assessed;" this is a sufficient rating and paying for the purpose of gaining a settlement. *Rex v. Corhampton*, Dougl. 621.

2. Payment, under a church-rate, made upon householders only, instead of the

parishioners at large, confers a settlement. *Rex v. St. Bees*, 9 East, 203.

(b 2) *Of a subsequent insertion of the name.*

The party's name must be included in the rate, before he pays it, for if it be inserted afterwards, he does not acquire a settlement. *Rex v. Edgbaston*, 6 T. R. 540.

(b 3) *Of rating, by the name of a former occupier.*

If the name of a former occupier, who to the knowledge of the parish officers is dead, is continued in the poor-rate, but the present occupier pays, he shall gain a settlement. *Rex v. Heckmondwicke*, Dougl. 564.

(b 4) *Of including the names of both landlord and tenant in the rate.*

1. If the title of a land-tax rate, is "an assessment on the inhabitants of the parish of A," and both the landlord's and tenant's names are in the rate, but without any words importing which is rated, and the tenant holds by paying a rent certain, clear of all taxes, parliamentary and parochial, and pays the rate, he gains a settlement. *Rex v. Mitcham*, Dougl. 226, n; *Rex v. Endon*, Id. 227, n; *Rex v. St. Lawrence*, Ibid.

2. Though a tenant has actually paid the land-tax, and his name is in the rate, in a column of "occupiers," yet, if the landlord's name is in a column of "landlords rated," the tenant does not gain a settlement. *Rex v. St. John's*, Dougl. 225.

3. If there is a column of proprietors, and another of occupiers, and it is not specified in the rate which is rated, and the tenant, on paying the land-tax, takes a receipt, in which the sum paid is described as "so much assessed on the landlord," the tenant gains no settlement. *Rex v. St. James*, Dougl. 227, n.

(c) *Of the payment.*

(c 1) *By whom made.*

1. The rate must be paid either in fact by the tenant himself, or, at least, constructively by the hands of his agent. An exciseman, therefore, who was rated to the land-tax for his salary, but never paid the rate, it being paid by the collec-

tor of excise, and not deducted out of the pauper's salary, gained no settlement. *Rex v. Woolly*, 2 East, 68.

2. The reason why the occupier of a tenement gains a settlement, by paying parochial taxes is, because the parish, by receiving them at his hands, recognize him for an inhabitant. Since, however, recognition imports knowledge, it is necessary that the officer should know that he is the party paying them; so that, if a tenement is rated as such to the poor, and by private agreement between the occupier and his landlord, the latter pays for the former, who is to reimburse him, the rate to the overseer, to whom, as well the agreement as the fact of the occupation are unknown, the occupier gains no settlement by such payment. *Rex v. The Inhabitants of Llangamarch*, 2 T. R. 628.

(c 2) *Of a payment to be repaid.*

A custom-house officer, who is rated to the land-tax, and pays it, will acquire a settlement, although the amount is either actually given him beforehand, or allowed him afterwards by the collector of the customs. *Rex v. Armouth*, 8 East, 383.

(c 3) *Miscellaneous.*

A tenant, rated to the land-tax, absconds; the collectors go to the house to distrain, in company and at the request of the landlord, who says, he shall otherwise lose his money. A friend of the tenant, at his daughter's request, pays the rate. Held, that this was a payment by the tenant. *Rex v. The Inhabitants of Bridgewater*, 3 T. R. 550.

(d) *Of the inhabitancy.*

1. That an inhabitant, paying rates, may gain a settlement, it seems, he must be an inhabitant forty days. *Rex v. St. Michael's, at Thorn*, 6 T. R. 536.

2. If a party reside in one parish, and is rated in another, he gains no settlement in either. *Rex v. St. Michael's at Thorn*, 6 T. R. 536.

(e) *Of the proofs necessary to establish this settlement.*

(e 1) *Production of the rate, whether necessary.*

The rate itself must be produced to prove a settlement, by being rated, and

paying rates. *Rex v. Inhabitants of Cop-pall*, 2 East, 25.

VIII. OF SETTLEMENT BY ACKNOWLEDGMENT OF THE PARISH.

(a) *Of acknowledging a settlement by relief.*

(a 1) *Of the proofs and presumptions to establish this settlement.*

1. The fact of having received relief from a parish, warrants no inference that the party was settled therein. *Rex v. Inhabitants of Chadderton*, 2 East, 27; *Rex v. Chatham*, 8 East, 498.

2. The declarations of a deceased person, as to having been relieved by a parish, are not evidence of that fact, on an appeal. *Rex v. Inhabitants of Chadderton*, 2 East, 27.

3. Proof that the parish had relieved the pauper whilst residing out of it, rebuts the presumption arising from a certificate to his grandfather. *Rex v. Inhabitants of Stanley cum Wrenthorpe*, 15 East, 350.

4. Where a parish relieves, under circumstances which exclude the supposition of the relief being given to the party as casual poor, it is evidence that he is settled there. *Rex v. Wakefield*, 5 East, 335; 1 Smith, 512.

(b) *Of acknowledging a settlement by neglecting to appeal from an order of removal.*

1. An order of removal, unappealed from, is conclusive of the pauper's settlement against all the world. It has, likewise, the effect of terminating a contract of service entered into by the pauper, in the parish from which he has been removed, and under which he had gained an inchoate right to a settlement therein, to be made perfect on completion of the contract; since he is forbidden, by law, returning to that parish, and is, therefore, incapacitated from completing the contract. It does not, however, prevent him gaining another settlement by acts altogether subsequent to the removal. *Rex v. The Inhabitants of Kenilworth*, 2 T. R. 698.

2. An order of removal, unappealed against, is conclusive, not only on the persons removed, but also on all derivative settlements from them. *Rex v. St. Mary, Lambeth*, 6 T. R. 615.

3. An order of removal, executed and unappealed from, is conclusive on the parish upon which the order is made, against all the world. *Rex v. Corsham*, 11 East, 388.

4. An order of removal, unappealed from, is conclusive as to the settlement of those mentioned therein; but of those only, not, therefore, of their children. *Rex v. The Inhabitants of Southowram*, 1 T. R. 353.

5. Where the man and woman have been removed as husband and wife, and the parish to which the removal is made has not appealed against the order, they are estopped from controverting the marriage. *Rex v. St. Mary Lambeth*, 6 T. R. 615.

6. If a woman is removed by the name and description of "E. Smith, widow," it is conclusive of her husband's settlement, if he is then alive, and the order unappealed from. *Rex v. Rudgeley*, 8 T. R. 620.

7. An order of removal, unappealed from, has not the effect of annulling a lease taken by the pauper in the parish from which he is removed; so that if the tenement be of the requisite value, and he return and reside upon it for forty days afterwards, he thereby gains a settlement. *Rex v. The Inhabitants of Fillongley*, 2 T. R. 709.

IX. OF SETTLEMENT BY MARRIAGE.

(a) *Of connecting the residence, as a wife, with that under another relation.*

The residence of a wife, as such, cannot be coupled with subsequent residence as a widow. *Rex v. South Lynn*, 5 T. R. 664.

(b) *Adjudication of the settlement of husband and wife.*

(b 1) *On whose testimony made.*

An adjudication of the settlement of husband and wife may be made upon the examination of the wife only. *Rex v. Binegar*, 7 East, 377; 3 Smith, 353.

(c) *Presumptive proof of settlement arising.*

(c 1) *From the description in the marriage register.*

The fact that the husband is described in the marriage register as being of such

a parish, is no evidence of his settlement. *Rex v. Harberton*, 13 East, 311.

(c 2) *From the removal of the wife.*

The removal of a feme covert is *prima facie* evidence that her husband's settlement is in the parish to which she was removed. *Rex v. Leigh*, Dougl. 46; *Rex v. Hincksworth*, Dougl. 46, n.

X. OF THE SETTLEMENT OF CHILDREN.

(a) *General rules.*

1. Children, whether legitimate or bastard, living with their mothers for nurture, but having a different settlement from her, are to be maintained by their own, not their mothers' parish. *Simpson v. Johnson*, Dougl. 7; *Rex v. Hemlington*, Id. 9.

2. A child may, after attaining twenty-one, derive a new settlement from its parent, provided it remain, at the time of its acquirement, a member of the father's family with an unbroken continuance. *Rex v. Roach*, 6 T. R. 247.

(b) *Of emancipation.*

1. A child, not an adult, does not, by a separation from his father's family, cease to be a part of it; and so long as he remains a part of it, the father's settlement, though acquired since the separation, is communicated to him. Before he can be said to be emancipated, he must either have obtained a settlement for himself, have become the head of a family, or at most, must have arrived at an age to set up for himself. *Rex v. The Inhabitants of Offchurch*, 3 T. R. 114.

2. A child is not emancipated by separation from his parent, and therefore, follows the parent's settlement as a part of his family, until, 1. He is of age:—2. Has married:—3. Has gained a settlement for himself:—4. Or has contracted a relation inconsistent with the relation of parent and child, and by which, therefore, the parent loses all authority over him. *Rex v. The Inhabitants of Edgeworth*, 3 T. R. 353; *Same v. The Inhabitants of Witton-cum-Twambrookes*, Id. 355.

3. The children must be emancipated at the commencement of his contract for that particular year's service under which the settlement is sought to be obtained. The child's entering into a contract, by which,

if completed, he may gain a settlement, and thereby become emancipated, does not qualify the parent for obtaining one. *Rex v. New Forest*, 5 T. R. 478; *Rex v. Cowhoneyborne*, 10 East, 88.

4. The mere circumstance of a voluntary separation by a child when of full age, who was thereby put out of the parent's controul, was held such an emancipation as prevented the communication of a new parental settlement. *Rex v. Roach*, 6 T. R. 247.

5. A son enlisted at the age of sixteen into the same regiment of militia in which his father was serving as a serjeant, and lived with him until the age of twenty-three, the father receiving his pay. Held, that he followed the father's settlement acquired during such time. *Rex v. Woburn*, 8 T. R. 479.

6. A child is severed from the parent's family, where it becomes the head or part of another family by marrying. *Rex v. Everton*, 1 East, 526.

7. Every separation in fact, does not amount to an emancipation, although it occurs after the age of majority; thus, where it is for an occasional purpose, such as going out for a few weeks in harvest. *Rex v. Sowerby*, 2 East, 276.

8. Marriage seems necessary to make a child the head of a family, when there is no separation. *Rex v. Sowerby*, 2 East, 276.

9. If a child has separated during its minority, and continues so after it has attained the age of discretion, it is emancipated. *Rex v. Stanwix*, 5 T. R. 670; *Rex v. Cowhoneybourne*, 10 East, 88.

(c) *In the case where the father is attainted.*

A father who gained a settlement, was attainted for felony; he married afterwards and had children, but received no pardon. The settlement was communicated to the children. *Rex v. St. Mary Cardigan*, 6 T. R. 116.

(d) *Of the evidence necessary to establish this settlement.*

(d 1) *Presumptive evidence.*

1. The place of a legitimate child's birth is *prima facie* its place of settlement. *Rex v. Heaton Norris*, 6 T. R. 653.

2. Proof of the father's settlement,

prima facie establishes that of the son. *Rex v. Stone*, 6 T. R. 56.

SEWERS.

I. RELATIVE TO THE COMMISSIONERS OF.

(a) *Jurisdiction of.*

(a 1) *Subjects of*, p. 896.

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(b) *Decrees of.*

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I. RELATIVE TO THE COMMISSIONERS OF.

(a) *Jurisdiction of.*

(a 1) *Subjects of.*

1. A commission of sewers, unless within two miles of London, extends only to navigable streams. *Yeaw v. Holland*, 2 Blk. 717.

2. The jurisdiction of commissioners of sewers, is not limited to cases where the sewer communicates directly with the sea. They have jurisdiction over a sewer communicating with a navigable river, though above the point of the ebb and flow of the tide, if the place over which the jurisdiction is exercised be, or be likely to be benefited by the sewer. *Dore v. Gray*, 2 T. R. 358.

(a 2) *How exercised.*

The commissioners of sewers under 23 Hen. VIII, c. 5, must present the lands of levels, &c. to be benefited by sea walls, &c. by juries summoned upon a precept directed to the sheriff, and by him summoned from the body of the county. The jury must be sworn in court, and present upon the testimony of witnesses. *Rex v. Commissioners of Sewers for Somersetshire*, 3 Smith, 105; 7 East, 71.

(b) *Decrees of.*(b 1) *Duration of.*

The words in the st. 23 Hen. VIII, c. 5, s. 17,—“laws, acts, decrees, and ordinances,” and the words in the st. 13 Eliz. c. 9,—“laws, ordinances, and constitutions,” are used to express the same things; the duration, therefore, of the decrees, &c. of commissioners of sewers, depends upon the provisions of the latter statute. *Re v. The Commissioners of Sewers for Somerset*, 9 East, 109.

(b 2) *Removal of, by certiorari.*

The preponderance must be very strong against the propriety of an order of commissioners of sewers, to induce the court to grant a *certiorari* to remove it, since by delay the country may be inundated. *Re v. The Commissioners of Sewers for the Western Division of Somersetshire*, 8 T. R. 312.

II. RELATIVE TO ASSESSMENTS TO.

(a) *Who are liable to.*

1. Those only are liable to be assessed by the commissioners of sewers, who derive, or are likely to derive benefit from the work in question. *Masters v. Scroggs*, 3 M. & S. 477.

2. The level, and not the persons bound by tenure or otherwise to repair a sea bank, must repair it when destroyed by unavoidable accident. *Re v. The Commissioners of Sewers for the Western Division of Somersetshire*, 8 T. R. 312.

III. PLEADINGS RELATIVE TO.

(a) *Averment that a sewer is common.*

It seems that it will be presumed that a place alleged in pleading to be a sewer, is a common sewer; at all events it will, if it be further alleged that the tide ebbs and flows there. *Dore v. Gray*, 2 T. R. 358.

SHEEP-STEALING.

STATUTES RELATIVE TO.

(a) 14 Geo. II, c. 6. s. 1.

The st. 14 Geo. II, c. 6, s. 1, takes away clergy from those who are convicted of sheep-stealing. An outlawry is a conviction within the meaning of the statute. *Re v. Yandell*, 4 T. R. 521.

SHERIFF.

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(a) *To fees and remuneration.*

- (a 1) *Under 29 Eliz. c. 4*, p. 899.

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I. RELATIVE TO THE OFFICE OF.

(a) *Information for refusing to serve.*

A criminal information was granted for refusing the office of sheriff; because the public good required that the office should not remain vacant, and therefore that the matter should be determined by a more speedy process than indictment, which probably would not be determined till just before the expiration of the year. *Res v. Woodrow*, 2 T. R. 731.

II. RELATIVE TO HIS RIGHTS.

(a) *To fees and remuneration.*

(a 1) *Under 29 Eliz. c. 4.*

Poundage is the only fee to which the sheriff is entitled, under the statute 29 Eliz. c. 4. *Woodgate v. Knatchbull*, 2 T. R. 148.

(a 2) *Under 43 Geo. III, c. 99.*

The sheriff is entitled to levy costs under 43 Geo. III, c. 99, on an extent against a collector of taxes; and the sheriff's poundage is included in the word charges, and may be levied; and it is payable where the money is paid in, before a *venditioni exponas* has issued, although the proceeding is obviated thereby. *Res v. Collingridge*, 3 Price, 280.

(a 3) *On a capias utlagatum.*

Where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right. The sheriff's right, therefore, to poundage, rests entirely upon the positive enactments of statutes; within which he must bring himself, in every case where he claims poundage for executing a writ. A *capias utlagatum*, on mesne process in a private suit, is not "an extent or execution," within the meaning of 29 Eliz. c. 4; in its original form it is for the punishment

of the party's contumacy, and not for the payment of a debt; there are no means of estimating the sheriff's right to poundage under it, for the whole of the defendant's goods are to be taken, and not property to such an amount. Therefore, the sheriff is not entitled to poundage under the stat. Eliz. for executing such writ. *Graham v. Grill*, 2 M. & S. 294.

(a 4) *Under an extent.*

The sheriff is not entitled to poundage upon stamps in the possession of a distributor seized under an extent. *Res v. Villers*, Wightw. 95.

(a 5) *For incidental expenses.*

1. The sheriff cannot claim the expense incurred in keeping an officer in possession of goods seized by him under a writ. No statute has given him that right. *Graham v. Grill*, 2 M. & S. 294.

2. The sheriff, besides his poundage, charged 5 per cent. for an auctioneer to sell malt; the charge was disallowed. *Res v. Crackenthorpe*, 2 Anst. 412.

(a 6) *Amount of, how regulated.*

The fees of the sheriff's officer for making an arrest, are to be regulated by the court; and a regulation by the sessions, though acted upon for a long time, is a nullity. *Boldero v. Mosse*, 3 T. R. 417.

(a 7) *When entitled to, in point of time.*

Not (to poundage) until the goods are sold. Loft. 433.

(a 8) *Who are liable for.*

1. Before the statute 43 Geo. III, c. 46, the sheriff might have brought debt against the plaintiff for poundage under an execution at his suit. That statute provides, that the plaintiff may, where his execution is against the goods, &c. levy the poundage over and above the sum recovered. This has not changed the former rights of the sheriff, since the act passed to give a boon to the plaintiff, and entitle him to levy that in which he stands indebted to the sheriff. *Rawstorne v. Wilkinson*, 4 M. & S. 256.

2. If on an extent issuing against the acceptors of bills of exchange drawn in favour of officers of the crown, for public money received by the drawers, and remitted by them to the acceptors

for the purpose of levying the crown's debt,—the drawers, after the execution of that process, take up and pay the bills, they are not liable to pay the sheriff's poundage on the levy. And the sheriff having retained, under an order of the court, a sum for poundage in his hands, will be ordered to restore it to the assignees of the bankrupt acceptor's estate. *Semble*, that whatever be due to the sheriff for poundage, in such a case, should be paid by the crown. *Rex v. Freme*, 2 Price, 58.

(a 9) *Whether invalidated by a compromise.*

A sheriff who levies under a writ of execution, is entitled to his poundage, notwithstanding the parties afterwards, and before sale, compromise the debt. *Alchin v. Wells*, 5 T. R. 470.

(a 10) *Whether invalidated by the invalidating of the original proceeding.*

The stat. 29 Eliz. c. 4, enacts, that the sheriff shall be entitled to poundage upon such sum as he shall levy or extend "and deliver in execution." Notwithstanding these latter words, the sheriff may claim poundage in a case where he has levied under an execution, which, together with the judgment, is afterwards set aside for irregularity in the plaintiff, and the proceeds restored. If the sheriff has levied regularly, he cannot be affected by the irregularity of the antecedent proceedings. *Rawstorne v. Wilkinson*, 4 M. & S. 256; Loft. 253, *contra*.

(a 11) *Of the action for,—parties to.*

An action for fees, under the statute 29 Eliz. c. 4, must be brought in the name of the sheriff, not the bailiff. *Woodgate v. Knatchbull*, 2 T. R. 155.

(a 12) *Of the action for,—declaration.*

A judgment by default, in an action for non-payment of sheriff's poundage, brought by the plaintiff in an execution, will not be reversed, because the declaration does not aver the amount of the poundage, and notice thereof given to the defendant. *Pullin v. Stokes*, 2 H. B. 312.

(a 13) *Of deducting for.*

The sheriff selling under a *renditioni exponas*, is not entitled to deduct any thing either for extra expenses or poundage, or

to return such a deduction. He must make a return of the whole sum produced by the sale, when the court order it to be paid over, deducting poundage; and he must move the court for any extra allowance to which he may be entitled. *Rex v. Jones*, 1 Price, 205.

(a 14) *Of the execution for.*

Where, on a *mandamus* to admit a free-man, the party pleads, and damages and costs are given to the prosecutor, he is entitled to levy in execution for the sheriff's poundage also, under 43 Geo. III, c. 46. *Rex v. Mayor of Glamorgan*, 2 Smith, 8.

(a 15) *As between two sheriffs.*

1. Where two extents issue into different counties, the sheriff, who completes his levy, is entitled to full poundage. *Rex v. Caldwell*, 1 Anst. 279.

2. Two extents issued into different counties, and both sheriffs levied to the whole amount. Upon the levy of the one, the debt was paid. This sheriff is entitled to his full poundage. *Rex v. Fry*, 2 Anst. 358.

3. Two extents issued into different counties for the same debt; both sheriffs seized goods; the debt was paid to the one before a *venditioni exponas* issued to either. He shall have the whole poundage. *Rex v. Barber*, 3 Anst. 717. But where the debt was paid to the officers of the crown immediately, although by compulsion of the one levy, the poundage was apportioned between the sheriffs. *Rex v. Fry*, 3 Anst. 718, n.

4. Two extents having issued against A, and an extent in aid into another county, against B. for the same sums, B. paid the whole debt, giving notice to the sheriff to retain the money, till the legality of the extent in aid was tried. Afterwards A. paid part of the money to B. in consequence of arrangements amongst themselves. The sheriff who took the inquisitions against A, is not entitled to any share of the poundage. *Rex v. Bowles*, Wightw. 116.

III. RELATIVE TO HIS PRIVILEGES.

(a) *To the protection of the court.*

(a 1) *In the case of contending parties.*

The court will protect a sheriff between two contending parties, without putting

him to file a bill of interpleader. *Mac George v. Birch*, 4 Taunt. 585.

(a 2) *In the case of a bankruptcy.*

1. Where a sheriff behaves fairly, and prays the assistance of the court, he shall not be put to try a question of the bankruptcy of the defendant, between his assignees and the plaintiff, at his own expense. *Raines v. Nelson*, 2 Blk. 1181.

2. A sheriff acting fairly under a writ, without notice of any act of bankruptcy, will be protected when sued, unless indemnified, and a nominal defendant only. *Aldridge v. Ireland*, 1 Taunt. 274.

(b) *To have an entry of bail struck out.*

Where bail above are put in but not justified, and the sheriff being fixed brings an action on the bail bond, to which the defendant pleads *comperuit ad diem*; the court will, on motion by the sheriff, order the recognizance of bail, in the original action, to be struck off the file, though the defendant allege that the sheriff was fixed through his own negligence; for that should be the subject of motion to stay the proceedings on the bail bond. *Leigh v. Bartles*, 1 Mars. 520; 6 Taunt. 169.

IV. RELATIVE TO HIS RETURN.

(a) *When made.*

(a 1) *Rule of K. B. relative to.*

Rule relative to the returning of writs by sheriffs, and motions for attachments on neglect. K. B. Mich. 32 Geo. III, 4 T. R. 496.

(a 2) *Where the rule to return expires in vacation.*

1. The rule of K. B. M. 32 Geo. III, 4 T. R. 496, only applies where the rule expires in term time, and before the last day of term. If, therefore, a rule to return a *fi. fa.* expires in vacation, the sheriff has till the first day of next term, and all that day to file his return. *Rex v. The Sheriff of Berks*, 5 East, 386; 1 Smith, 427.

2. Where a rule to return a writ issued out of C. B. expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing term; the C. B. office being open during the vacation. *Rex v. Sheriff of Middlesex*, 1 Mars. 270; 5 Taunt. 647.

(b) *Of enlarging the time for making.*

1. Time for returning a writ will not be granted for the mere asking, without sufficient cause shewn. *Wells v. Pickman*, 7 T. R. 174.

2. Where the sheriff shews reasonable grounds for doubt, whether he ought to execute a writ at the suit of a private person, on an extent of the crown, for revenue duties; the court will enlarge the time for making his return to the former writ, that the doubt may be litigated in the Exchequer. *Wells v. Pickman*, 7 T. R. 174.

(c) *Amendment of.*

If to a writ of *venditioni exponas* for goods already taken in execution, with a clause of *fi. fa.* for the residue, the sheriff return that he has made of the said goods 20*l.* but omit, by mistake, to return *nulla bona* to the *fi. fa.*, the court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return. *Res v. Sheriff of Monmouth*, 1 Mars. 344.

(d) *Conclusive nature of.*(d 1) *In relation to himself.*

The return of the sheriff is conclusive against him, since thereby he recognizes the act done as his own; therefore he is liable to treble damages at the suit of the party grieved, under stat. 29 Eliz. c. 4, if it appear by his return that greater fees have been taken in executing a writ than are allowed by that statute. *Woodgate v. Knatchbull*, 2 T. R. 148.

(d 2) *In relation to third persons.*

No averment can be taken in pleading against the sheriff's return. *Harrington v. Taylor*, 15 East, 378. If false, the remedy is by action. Loft. 371.

(e) *Implication from.*

1. In case for maliciously suing out an *alias fi. fa.* after a sufficient levy under the first, the sheriff's return indorsed on the two writs, stating that he had forborne to sell under the first, and had sold under the second at the request of the now plaintiff, were held *prima facie* evidence of the fact so returned. *Gyfford v. Woodgate*, 11 East, 297.

2. The sheriff's return to a *fi. fa.* that he has levied the money, furnishes no

proof that he has paid it over to the creditor. *Cator v. Stokes*, 1 M. & S. 599.

(f) *Return of a rescue.*(f 1) *Its form.*

The sheriff is the only officer known to the court. Therefore, if he return a rescue it must be that the rescue was from his custody, though, in point of fact, it was from the bailiffs. *Woodgate v. Knatchbull*, 2 T. R. 156.

(g) *Return to a venditioni exponas.*

It is not a contempt in the sheriff to return to a *venditioni exponas* that the goods remain unsold for want of buyers. *Leader v. Danvers*, 1 B. & P. 359.

(h) *A false return defined, in a particular instance.*

Return, *non est inventus*, with the name of the sheriffs of the last year, is a false return by the sheriffs of the present. Loft. 83.

(i) *Miscellaneous.*

The court will not, on the motion of the defendant, compel the sheriff to give a specific return of the particulars and proceeds of goods sold under a *fi. fa.*, on the ground that his officer has wasted the goods. *Willett v. Sparrow*, 2 Mars. 293; 6 Taunt. 576.

V. RELATIVE TO INQUISITIONS BY.

(a) *Their operation in law.*

1. An inquisition made by a sheriff's jury, for the purpose of ascertaining who was entitled to the property of goods taken under an execution, is not admissible evidence even against the sheriff, in an action of trover, brought by the party in whose favour the inquisition was found. *Lattow v. Eamer*, 2 H. B. 437.

2. The return to a writ made by the sheriff is at his peril; if false he is liable, though made in pursuance of an inquisition taken by him. Such inquisition, however, will protect him from vindictive damages, since it proves that his return was *bona fide*. *Glossop v. Pole*, 3 M. & S. 175.

(b) *Summary jurisdiction over.*

The court have no jurisdiction over an inquisition taken by the sheriff for his own indemnity. *Roberts v. Thomas*, 6 T. R. 88.

VI. RELATIVE TO HIS INDORSEMENTS ON WRITS.

(a) *Implication of a delivery from.*

In debt for an escape against the sheriff, the indorsement on the writ of *non est inventus*, is sufficient evidence that it was delivered to the sheriff. *Blatch v. Archer*, Cowp. 63.

VII. RELATIVE TO SALES BY.

(a) *Implied condition relative to title.*

A sheriff selling goods, impliedly undertakes that he does not know that he has no right to sell them. *Peto v. Blades*, 5 Taunt. 657.

VIII. RELATIVE TO CONTRACTS BY.

(a) *A promise to sell to any nominee.*

An action does not lie against the sheriff upon a promise to execute a bill of sale to the plaintiff's nominee. *Cameron v. Reynolds*, Cowp. 406.

IX. RELATIVE TO SERVICES UPON.

(a) *Where made.*

The offices of the agents for the under-sheriffs of London, Middlesex, and Surrey, are considered as the offices of the under-sheriffs. *Rex v. Coles*, Dougl. 420.

(b) *On whom made.*

Service of a rule to return a writ on the under-sheriff's agent in town, is not good service. *Rex v. Coles*, Dougl. 420.

X. RELATIVE TO HIS LIABILITIES.

(a) *For not taking a bail-bond.*(a 1) *Extent of.*

Since bail below are liable for the plaintiff's demand up to the penalty of the bail-bond, though it exceed the sum sworn to, and costs; the sheriff, on discharging the defendant, &c. without taking a bond, is liable to the same extent. *Stevenson v. Cameron*, 8 T. R. 29.

(b) *For the penalties of extortion.*(b 1) *Preliminary steps.*

The 50 l. penalty against officers for extortion, inflicted by st. 32 Geo. II, c. 28, is not recoverable, unless a table of fees has been previously made out pursuant to the statute. *Martin v. Skidde*, 2 N. R. 59.

(c) *For invading a franchise.*

The sheriff is bound to take notice of all the different liberties within his county; so that he will be liable to the owner of any one which he invades. *Booth v. The Earl of Surry*, 2 T. R. 10.

(d) *For the acts of his own appointed officers.*(d 1) *When liable.*

1. If a bailiff on a *fi. fa.* against the goods of A. take those of B, trespass lies against the sheriff. *Saunderson v. Baker*, 3 Wils. 309; 2 Blk. 832; Loft. 81; *Ackworth v. Kempe*, Dougl. 40.

2. A sheriff is liable, even under a penal statute, for the misconduct of his officer, *colore officii*, when charged to execute the law. *Sturmy v. Smith*, 11 East, 25; thus, under 32 Geo. II, c. 28. *Peshall v. Layton*; *Same v. Martin*, 2 T. R. 712; though the act be an indictable offence. *Woodgate v. Knatchbull*, 2 T. R. 148.

(d 2) *Evidence to connect him with.*

1. The bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff to arrest, without proving the warrant. *Blatch v. Archer*, Cowp. 66.

2. A sheriff is only liable for the misconduct of his officer when charged by him with executing the law; and therefore, when sued for such misconduct, he must be connected with him in the affair in question, and shewn to have deputed to him the authority abused. Proof that the person who committed the trespass was his general bailiff, and had given him a bond of indemnity, is not sufficient for this purpose. *Drake v. Sykes*, 7 T. R. 113.

3. In an action against the sheriff for not arresting, it is not sufficient evidence to connect the sheriff with his officer, that the officer's name appears on the writ, and that the writ has been returned *non est inventus*—the sheriff having gone out of office before the return. *Fonsick v. Magnay*, 1 Mars. 554; 6 Taunt. 231.

4. The copy of the indorsement of a bailiff's name on a writ, is no proof against the sheriff that the person there named was the bailiff employed to levy. *Hill v. Sheriff of Middlesex*, 7 Taunt. 8.

(e) *For the acts of a special bailiff.*

1. Where a special bailiff has been ap-

pointed to execute a writ at the instance of the party who sued it out, the sheriff is not answerable for its execution. The party, therefore, cannot rule him to return it. *De Moranda v. Dunkin*, 4 T. R. 119; *Hamilton v. Dalziel*, 2 Blk. 952.

2. If the defendant is arrested by a special bailiff of the plaintiff's nomination, the sheriff is not answerable for the bailiff's misconduct, nor for the forthcoming of the prisoner, until he is actually in gaol, or otherwise in the sheriff's actual custody. *Taylor v. Richardson*, 8 T. R. 505.

(f) *For the acts of the bailiff of a franchise.*

A sheriff is not liable for the misconduct of the bailiff of a franchise situated within his county. *Boothman v. The Earl of Surry*, 2 T. R. 5.

XI. OF PROCEEDINGS AGAINST, IN GENERAL.

(a) *Of ruling him to return a writ.*

1. Where the sheriff seizes goods under a *fi. fa.*, and keeps possession at the defendant's desire, to enable him to pay the debt and costs without sale; the defendant, after such payment, may rule the sheriff to return the writ. *Edmunds v. Watson*, 2 Marshall, 330; 7 Taunt. 5.

2. If, after a writ of execution has issued the matter is compromised, neither party can rule the sheriff to return the writ. *Alchin v. Wells*, 5 T. R. 470.

(b) *For neglecting to return a writ.*

—Under special circumstances, the court, after hearing the prothonotaries' report, to whom the matter was referred, obliged a sheriff, attached for not duly returning a writ of *fi. fa.*, to pay the whole debt and all the costs incurred to the plaintiff. *Rex v. The Sheriff of Middlesex*, 1 H. B. 543.

(c) *Irregularity in,—waiver of.*

The sheriff, by delaying, waives his objection to an attachment, on the ground of irregularity. *Rex v. The late Sheriff of Middlesex*, 4 East, 604; *infra*, 907, (e).

XII. OF PROCEEDINGS AGAINST, IN RELATION TO BAIL.

(a) *Whether against the sheriff or the bailiff of a franchise.*

After the sheriff has returned the answer

of the bailiff of a franchise, the bailiff, not the sheriff, must be ruled to bring in the body. *Booth v. The Earl of Surry*, 2 T. R. 10.

(b) *Of the rule to return the writ.*

(b 1) *Whether necessary.*

The only way to call on a sheriff to return a writ, is, by rule and process of the court. Therefore, a request by the party within six months after the expiration of the sheriff's office, and a neglect by the sheriff, are not sufficient whereon to found an attachment. *Rex v. Jones*, 2 T. R. 1.

(b 2) *When issuable.*

A rule calling upon the sheriff to return a writ, supposes that he has been guilty of negligence; therefore it should not issue until after the day on which the writ is returnable; and though it be tested after, yet if it actually issued before that day, it is irregular. *Rex v. The Sheriff of Cornwall*, 1 T. R. 552.

(b 3) *Return thereto, when made.*

Sheriffs of London and Middlesex must return writ and bring in body within four days. K. B. Trin. 6 Geo. III; 3 Burr, 1291.

(b 4) *Course of proceeding where notice is given that the writ is lost, and the defendant is in custody.*

Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody;—held, that the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*, and the court set aside an attachment issued against the sheriff for not returning the writ. *Rex v. Sheriff of Kent*, 1 Mars. 289.

(c) *Of the rule to bring in the body.*

(c 1) *When issuable.*

1. A rule to bring in the body cannot be taken out until the day after the rule to return the writ expires. *Hutchins v. Hird*, 5 T. R. 479.

2. The rule to bring in the body cannot be taken out until the time for putting in bail has expired. *Rex v. The Sheriff of Middlesex*, 8 East, 525; *Rolfe v. Steele*, 2 H. Bl. 276.

3. The rule to bring in the body, may be taken out on the day immediately after the sheriff has returned the writ, if the time for putting in bail is then expired. *Gore v. Williams*, 3 Anst. 653.

4. The rule on the sheriff, to return the writ, expired two days after the end of the term; a rule to bring in the body, taken out next day, but tested on the last day of term, was held regular. *Buckler v. Blyth*, 3 Anst. 779.

(c 2) *Teste of.*

A rule to bring in the body, tested on the day of return *cepi corpus*, though not issued until after that day, is irregular. *Rex v. The Sheriff of London*, 2 East, 241.

(c 3) *Service of.*

The rule to bring in the body may be served upon the sheriff the same day on which he returns *cepi corpus* to the rule to return the writ, provided the time for putting in bail has expired, but not otherwise. *Rex v. Sheriff of Middlesex*, 4 M. & S. 427.

(c 4) *Time allowed by.*

The sheriff has four days, exclusive of that on which the rule was served. Loft. 631.

(d) *Of the attachment against.*

(d 1) *Preliminaries to.*—1. *exception to bail.*—2. *service.*

1. As well in the case of added, as of original bail, *Anon.* Loft. 159; the sheriffs cannot be attached for their not having justified in time, unless they have been excepted to. *Rex v. The Sheriff of Middlesex*, 8 T. R. 258.

2. To found an attachment against the sheriff, the service must be at his office, not upon his servant at his house. *Anon.* Loft. 301.

(d 2) *How obtained, by affidavit of service.*

An attachment against the sheriff, for not bringing in the body, can only be granted on an *affidavit* of service of the rule; and no evidence, however strong, that the sheriff had received the rule, will supply the want of it. *Harmer v. Tilt*, 2 Marshall, 251.

(d 3) *Motion for, when made.*

1. Where a rule to return the writ expires on the last day of term, an attach-

ment may be moved for at the rising of the court on that day. *Rex v. The Sheriff of Surry*, 11 East, 591.

2. Where the defendant was rendered in discharge of bail, and the defendant's attorney called to give notice of render that night, but finding no one in the way, saw the plaintiff's attorney the next morning, and then gave notice;—held, that an attachment against the sheriff, moved for on that day, although the instructions to the counsel were given before the notice, was irregular, and the attachment accordingly set aside. *Rex v. Sheriff of Middlesex*, 2 Smith, 242. (the page in the original is marked 243.)

3. Rule as to the time for moving for, and issuing of, an attachment for not bringing in the body. C. B. Trin. 38 Geo. III; 1 B. & P. 312.

(d 4) *Defence to.*—*previous justification of bail.*

1. If bail are justified at any time before motion, for an attachment against the sheriff, though after the rule to bring in the body has expired, it is sufficient to prevent it. *Thorold v. Fisher*, 1 Hen. Bl. 9.

2. On payment of costs, justification of bail was permitted on the day after the expiration of the body-rule. *Weddall v. Berger*, 1 B. & P. 325.

(d 5) *Defence to.*—*previous surrender.*

1. The rule of K. B. Trin. 33 Geo. III, 5 T. R. 368, allowing *bail* to render their principal after the sheriff has been ruled to bring in the body without justifying, extends to the sheriff; and, likewise, to the case where the rule has been granted before bail have been put in, or justified, and after the time for putting in or justification has expired. *Rex v. The Sheriff of Middlesex*, 7 T. R. 527.

2. A surrender, by the bail, on any part of the last day allowed for justification, is sufficient to preclude an attachment against the sheriff. *Rex v. The Sheriff of Middlesex*, 8 T. R. 464.

3. If the defendant is surrendered, though after the rule for bringing in the body has expired, it is irregular to move for an attachment. Had the defendant perfected bail, the plaintiff could not have proceeded with his attachment; and a surrender is equivalent to perfecting bail.

Rex v. Sheriff of Middlesex, 2 M. & S. 562, over-ruling, *Rex v. Same*, 8 T. R. 30.

4. Surrender of the principal, before attachment obtained, discharges the sheriff, although he has not taken a bail-bond. *Morley v. Cole*, 1 Price, 103.

(d 6) *Defence to,—illegality of the arrest.*

Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken A. B. sued by the name of C. B.," the sheriff is a trespasser; and the court will set aside an attachment against him for not bringing in the body. *Rex v. Sheriff of Surry*, 1 Mars. 75.

(d 7) *Defence to,—irregularity in the previous proceedings.*

A waiver by the defendant of an irregularity on the part of the plaintiff, will not preclude the sheriff from insisting on it. *Cohn v. Davis*, 1 H. B. 80; *Rogers v. Mapleback*, Id. 106.

(d 8) *Discharge of,—terms of.*

1. If, after an attachment against the sheriff, bail is put in, the court will set aside the attachment, provided a trial has not been lost. *Hill v. Bolt*, 4 T. R. 352; *Gravett v. Williams*, Id. n. (a).

2. If an application to set aside an attachment against the sheriff for not bringing in the body, is made on behalf of the defendant, there must be an affidavit of merits; if on behalf of the sheriff, though it cannot be expected that he should swear to merits, the court will require an affidavit that the application originated from him, and was not made in collusion with the defendant in the cause. *Rex v. Sheriff of Surry*, 7 T. R. 239.

3. The sheriff can only be discharged from an attachment for not bringing in the body upon payment of the whole debt and costs, and not merely of the sum sworn to and costs. *Heppel v. King*, 7 T. R. 370; *Fowlds v. Mackintosh*, 1 H. B. 233.

4. In K. B. the sheriff is only liable to the extent of the penalty in the bail-bond, for not bringing in the body; therefore an attachment against him for that cause, will be set aside on payment of the penalty, or a less sum, if less is due. *Rex v. The Sheriff of Middlesex*, 3 East, 604.

5. Bail to the sheriff may set aside an attachment, upon payment of costs and putting in bail, without swearing to merits, or that there is no collusion, if it be sworn that it is made on the part of the bail to the sheriff. *Rex v. Sheriff of Middlesex*, 3 Smith, 340.

6. As well since as before the stat. 43 Geo. III, c. 46, s. 2, the sheriff will be relieved from an attachment for not bringing in the body, only on payment of the whole debt and costs. *Rex v. The Sheriff of London*, 9 East, 316.

7. If after an attachment against the sheriff for not bringing in the body has regularly issued, bail above are put in and justified, the court will, upon application, supported by an affidavit, either of merits or that the application is made on behalf of the sheriff, set aside the attachment. But not without such affidavit. *Rex v. Sheriff of Middlesex*, 3 M. & S. 299.

8. An attachment against the sheriff issued before the time for perfecting bail has expired, will not be set aside, unless the bail have been perfected. *North v. Evans*, 2 H. B. 35.

9. Where the plaintiff has not been delayed, an attachment against the sheriff for not putting in bail will be set aside on the terms of paying costs and perfecting bail only. *Callan v. Tye*, 2 H. B. 235.

10. Justification of bail was permitted after an attachment granted against the sheriff; reserving to the plaintiff all rights connected with the attachment. *Williams v. Waterfield*, 1 B. & P. 334.

11. After attachment granted against the sheriff, bail will be permitted to justify on the same day, and the attachment will be set aside on payment of costs. *Turner v. Bristow*, 2 B. & P. 38.

12. The sheriff may, without justifying bail, set aside an attachment that has been moved for too early. *Maycock v. Solyman*, 1 N. R. 139.

13. The bail do not justify on the day appointed, and in consequence the plaintiff, in the evening of that day, instructs counsel to move for an attachment against the sheriff. Afterwards, and in the same evening, but after nine o'clock, notice is given that the bail will surrender on the morrow; when, but after surrender, the attachment is obtained. Held, that it could be set aside only on payment of the

costs of instructing counsel. *Rex v. The Sheriff of Middlesex*, 1 Taunt. 56.

14. An attachment against the sheriff for not returning the writ, was discharged, on affidavit that the defendant was not seen in the county, and that the return of *non est inventus* was made one day too late by a mistake of the clerk, who supposed that it was in time. *Saxton v. West*, 2 Anst. 479.

15. The court will set aside an attachment against the sheriff, on payment of costs, if the defendant has been rendered on the evening of the last day of the rule, and notice be given early next morning. *Rex v. The Sheriffs of London*, 1 Price, 338.

(d) *Discharge of,—by death of the plaintiff.*

The death of the defendant, after the sheriff is in contempt, for not bring in the body, though it abates the action, does not absolve this crime; therefore he remains liable to an attachment. *Rex v. The Sheriff of Middlesex*, 3 T. R. 133.

(e) *Irregularities in,—waiver of.*

An irregularity in an attachment against the sheriff, from the rule to bring in the body having been taken out prematurely, is waived by delay in applying to set it aside. *Rolfe v. Steele*, 2 H. B. 276; *supra*, 904, XI. (c).

(f) *Waiver of proceedings against, in relation to bail.*

(1) *By delay.*

1. The sheriff is discharged, by unreasonable delay in proceeding against him. *Rex v. Perring*, 3 B. & P. 151; and delay, arising from the defendant's proposing a compromise, is not therefore excused. *Rex v. The Sheriff of London*, 1 Taunt. 111.

2. The sheriff is not discharged by a neglect to proceed against him, unless led to conclude that the business was settled, and thereby prejudiced. *Rex v. The Sheriff of London*, 1 Taunt. 489.

3. Where the sheriff has been prevented paying the debt, and proving it under the defendant's commission, from a delay in issuing the attachment: when issued, it will be set aside. *Rex v. Sheriff of Surrey*, 9 East, 467.

4. In Hilary term the sheriff returned *cepi corpus*; after which, no proceedings were had until Michaelmas term, when he was rule to bring in the body, and an attachment granted for neglect. The court set the attachment aside on account of the delay, and because the bail had become insolvent, and the defendant had absconded. *Rex v. The Sheriff of Surrey*, 7 T. R. 452.

(f2) *By accepting security.*

1. The plaintiff, by accepting a *cognovit*, discharges the sheriff; at least where it is conditioned for payment by instalments. *Rex v. The Sheriff of Surrey*, 1 Taunt. 159.

2. A warrant of attorney to confess judgment, with a defeazance upon payment by instalments, discharges the sheriff. *Brown v. Neave*, Wightw. 121.

XIII. OF ACTIONS AGAINST.

(a) *For a breach of duty in general.*

(a 1) *Parties to.*

All actions for breach of duty in the office of sheriff, must be brought against the high sheriff, though the actual default be that of the under-sheriff or bailiff. *Cameron v. Reynolds*, Cowp. 403.

(b) *For a false return.*

(b 1) *Evidence in.*

Possession is *prima facie* evidence of property in goods; as in an action against the sheriff for a false return of *nulla bona* to a *fi. fa.* *Crosley v. Arkwright*, 2 T. R. 609.

(c) *For extortion.*

(c 1) *Declaration.*

In debt *qui tam* against a bailiff for extorting illegal fees in executing a *fi. fa.*, if the plaintiff sets out the judgment on which the writ was founded, he must also prove it. *Savage v. Smith*, 2 Blk. 1101.

(d) *For levying on the property of a bankrupt.*

(d 1) *Form of.*

Upon principles of policy, trespass *vi et armis* will not lie against a sheriff at the suit of the assignees of a bankrupt for taking the bankrupt's goods in execution after an act of bankruptcy, but before the issuing of the commission. Trover is the proper remedy, in which the jury

cannot, as they might in trespass, give vindictive damages. His selling them after the commission has issued, and notice not to sell given by the provisional assignee, cannot make him a trespasser, since a sale is an act of conversion and not of trespass. *Smith v. Milles*, 1 T. R. 475.

XIV. OF JOINT PROCEEDINGS AGAINST HIMSELF AND HIS OFFICER.

(a) *Under 32 Geo. II, c. 28.*

1. If separate actions be sued against the sheriff and his bailiff for penalties under stat. 32 Geo. II, c. 28, proceedings will be stayed, upon payment of one penalty and the costs in one action. *Peshall v. Layton*, 2 T. R. 512, 712; *Same v. Martin*, *Id.* 712.

2. It seems that the sheriff and his bailiff cannot be sued jointly under stat. 32 Geo. II, c. 28; and that the plaintiff must choose between them. *Peshall v. Layton*; *Same v. Martin*; 2 T. R. 712.

XV. RELATIVE TO THE SHERIFF'S OFFICERS.

(a) *Their duties.*

(a 1) *To make affidavit of the service of process.*

A bailiff is bound to make affidavit of service of process when required. *Rex v. Rudge*, 1 Blk. 432.

(b) *Authority of,—how deputed.*

An arrest by a bailiff, whose name has been inserted in a warrant by the officer to whom it was addressed, after it had been signed and sealed by the sheriff, is void, though addressed to that officer, and all other the sheriff's bailiffs. *Housin v. Barrow*, 6 T. R. 122.

(c) *Authority of, how executed.*

Though a sheriff's warrant, directed to four, and each of them, may be executed by two or by three; (*King v. Hobs*, Cro. Eliz. 913.) yet, if words of restriction are used as to the four, "jointly and not severally," they must act together. *Boyd v. Durand*, 2 Taunt. 161.

(d) *Summary jurisdiction over.*

(d 1) *Under the Lords' Act.*

A sheriff's officer is punishable under the Lords' Act, 32 Geo. II, c. 28. s. 11, for abusing the process of a court at West-

minster, only by that court out of which it issued. *Ex parte Evans*, 2 B. & P. 88.

XVI. RELATIVE TO THE OLD AND NEW SHERIFF.

(a) *Return to a writ, by whom made.*

It is exclusively the duty of that sheriff, to whom a writ is directed and delivered, and by whom it is executed, to make the return thereto; and if he goes out of office before the return-day, to hand over the writ and return to the new sheriff, to be by him returned into court. *Rex v. The late Sheriff of Middlesex*, 4 East, 604; 1 Smith, 286.

XVII. RELATIVE TO THE OLD SHERIFF.

(a) *Of calling for the return of process.*

By the true construction of 20 Geo. II, c. 37, a sheriff is not liable to be called upon to return process, unless within six lunar months after the expiration of his office; and the day on which he goes out of office is to be reckoned part of the six months. *Rex v. Adderly*, Dougl. 463.

(b) *Of ruling him to bring in the body.*

Rule for ruling a sheriff gone out of office, to bring in the body. *K. B. Trin.* 31 Geo. III, 4 T. R. 379.

(c) *Of attaching him for not bringing in the body.*

(c 1) *When ruled on the last day of the term preceding, &c.*

The late sheriff may be attached for not bringing in the body, though he was ruled on the last day of the term preceding the vacation in which he went out of office. *Meekins v. Smith*, 1 H. B. 629.

(d) *Mode of proceeding, where he has parted with a levy.*

A *distringas* to the new sheriff to compel the old one to sell goods taken under a *fi. fa.* but which he returned, remained in his hands for want of buyers, will not lie, where it appears that he has no longer possession. The remedy is by action for parting with them. *Clutterbuck v. Jones*, 15 East, 78.

XVIII. RELATIVE TO THE NEW SHERIFF.

(a) *Liability of, for the escape of a prisoner.*

That sheriff alone is liable for the

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escape of a prisoner, in whose custody he was at the time of escape; not, therefore, the new sheriff for an escape in the time of his predecessor, though he came into office before the day the writ under which, &c. was returnable. *Res v. The late Sheriff of Middlesex*, 4 East, 604; 1 Smith, 286.

XIX. RELATIVE TO THE UNDER SHERIFF.

- (a) *Appointment of more than one, whether allowable.*

The high sheriff can appoint only one under-sheriff extraordinary. *Denny v. Trappell*, 2 Wils. 378.

SHIP AND SHIPPING.

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I. RELATIVE TO THE OWNERSHIP IN.

- (a) *Proof of.*
 - (a 1) *In opposition to the register.*
- If, at common law, a ship, purchased by two partners, would, so far as creditors are concerned, be considered partnership

property, though their titles appear, by the certificate of registry, to be, not joint, but distinct and separate; they are joint nevertheless; the property, therefore, will, on their bankruptcy, form part of their joint estate. The policy of the Registry Acts, to exclude foreign interests, in British ships, is gained by simply naming the owners in the certificate; the specifying of their interests, therefore, is not required by those acts; consequently, such specification is not made by them. conclusive, (and by their operation only could it be conclusive,) upon the parties. *Ex-parte Jones*, 4 M. & S. 450.

(a 2) *Presumptive, arising from the register.*

Presumptive proof of ownership in a vessel, is not rebutted by evidence of an antecedent and a subsequent registration in another. *Robertson v. French*, 4 Epst, 130.

II. RELATIVE TO THE OWNER.

(a) *Who considered as.*

(a 1) *In general,—in relation to necessities supplied.*

The person, on whose account the contract was really made, though he be not the legal owner of the vessel, is liable for necessities supplied to her. *Westerdell v. Dale*, 7 T. R. 306; *Jackson v. Vernon*, 1 H. Bl. 114; *Young v. Brander*, 8 East, 10; *Trewhilla v. Rowe*, 11 East, 435; *Frazer v. Marsh*, 13 East, 238; *McIvor v. Humble*, 16 East, 169.

(a 2) *Whether the charterer or chartered party.*

1. It is a general rule, that the charterer, not the chartered party, of a ship, is to be considered as the owner. But there are exceptions to that rule, namely, where, by the terms of the charter-party, coupled with the particular nature of the service in which the ship is employed, an intention to vest the temporary property in the chartered party can be inferred. One of the terms, in the present case, was as follows: The charter-party "granted" the ship, and "let it to hire and freight," which are proper words of lease. The nature of the service was transport service. *Master, &c. of Trinity House v. Clark*, 4 M. & S. 288.

2. The charters granted to the Trinity

House impose duties for light-houses, buoyage, and beaconage, on the *masters and owners* of ships. A ship is chartered; and, upon a question who was to be considered as the owner, whether charterer or chartered party, held, that though the former was in general to be so considered, yet, that the particular terms of the charter-party, coupled with a consideration of the particular nature of the service contracted for, shewed an intention to transfer the ownership to the chartered party. The terms, *inter alia*, were, that the ship was "granted and let to hire and freight"; the service was to transport troops. *Rex v. Master, &c. of the Trinity House*, 4 M. & S. 288.

(a 3) *In relation to the register, or other documents.*

1. The registers of ships, are not evidence to fix the parties therein named as owners in actions against them, unless they are shewn to have been made by their assent, or recognized by them. *Tinkler v. Walpole*, 14 East, 226; *Cooper v. South*, 4 Taunt. 802; *Fraser v. Hopkins*, 2 Taunt. 5; *Price v. Anderson*, 4 Taunt. 652. *Secus*, the affidavits on which they were obtained. *Cooper v. South*, 4 Taunt. 802.

2. A party is not chargeable for necessities supplied to a ship, by proof of the execution of a bill of sale to him, without proof of his assent to the sale. *Tinkler v. Walpole*, 14 East, 226.

3. A party is not liable, as a partner, for goods furnished to a ship, having disposed of his interest therein at the time, merely because the form of transfer was defective. *McIver v. Humble*, 16 East, 169.

(a 4) *On a lease of the vessel to the master.*

Though the master of a vessel be also lessee of it, by agreement with the owners for a term of years, under covenants on their part, that he shall have the sole management of the ship, and employ her for his own sole benefit, &c. and on his part, that he shall repair her at his own sole cost, &c.; the owners are still liable for necessities furnished for the ship by order of the master, though without their knowledge, or without their being known to the person who supplied. *Rich v. Coe*, Cowp. 636.

(b) *Of his liability.*

(b 1) *For necessities supplied.*

A tradesman who supplies a ship with necessities under contract with the master, has three securities for payment; 1. The owner; 2. The master; 3. And lastly, a lien upon the vessel. *Farmer v. Davies*, 1 T. R. 109.

(b 2) *For wages.*

The owners are liable for the wages of seamen engaged by the captain. *Yates v. Hall*, 1 T. R. 76.

(b 3) *On carrying for hire.*

The responsibility of a ship-owner indifferently carrying for hire, is the same as that of a common carrier. *Yates v. Hall*, 1 T. R. 78.

(b 4) *For the acts of his crew, or others.*

1. Ship-owners are chargeable as for the not delivery of a cargo, which their captain or crew have pilfered. *Ellis v. Turner*, 8 T. R. 531.

2. The owner of a ship chartered as an armed vessel to the commissioners of the navy, is liable for an injury arising from the mismanagement of one placed on board by the commissioners. *Fletcher v. Braddick*, 2 M. R. 182.

(b 5) *Limitation of, under 7 Geo. II, c. 15.*

The policy of st. 7 Geo. II, c. 15, which limits the responsibility of ship-owners in case of embezzlement, &c. by master or mariners to the value of the ship and freight, is, to protect them from all treachery in these parties; and its words are sufficiently comprehensive for the end in view. Therefore, the case of a robbery by third persons, accomplished through intelligence given by a mariner who afterwards shared in the spoil, is within the act. *Sutton v. Mitchell*, 1 T. R. 18.

III. RELATIVE TO THE MASTER.

(a) *Of his authority over the vessel.*

(a 1) *General rules.*

1. *Seem*, that the captain of a vessel on any emergency, has authority to do what is most for the interest of those concerned. *Plantamour v. Staples*, 1 T. R. 611, n. (a.)

2. The owners of a ship cannot repudiate the master's contract, respecting the

vessel; for example,—a ransom bill, made in foreign parts, which, under the circumstances, seemed at the time to be most for their advantage, though, in the end, it turns out to be otherwise; as where the price of the contract exceeds the value of the ship and cargo. In such case, however, they may give up the property to the contracting party, when they will not be liable to the charge: if they keep it, they keep it subject to the charge imposed upon it by the master. But all necessary engagements collateral to such contract, and without which it could not have been made; for example,—an undertaking to remunerate a sailor if he would remain as a hostage under a ransom bill, given to an enemy, for the restoration of the property captured, are binding upon the owners, though they abandon the property. The reason of the difference is, that the principal contract is made upon the security of the property, upon the implied condition that the money shall be paid, or the property be restored: the other contracts are not. *Yates v. Hall*, 1 T. R. 73; *J. Butler*, dissent.

(a 2) *To sell.*

Seem, that, the master, in foreign parts, has no implied authority to sell the ship, though the expense of repairing will exceed the value. *Reid v. Darby*, 10 East, 143.

(a 3) *To hypothecate.*

1. The master may hypothecate the ship for the supply of necessaries in foreign parts. *Menetone v. Gibbons*, 3 T. R. 267, including Dougl. 103.

2. In cases of necessity abroad, as in order to procure bail where the vessel and cargo are libelled as prize, the master may hypothecate, but cannot stipulate for a sale as an indemnification. *Johnson v. Graves*, 2 Taunt. 344.

(b) *Lien of, on the vessel.*

1. The captain of a ship, has no lien on the ship for wages, stores, or repairs done in England. *Wilkins v. Carmichael*, Dougl. 101.

2. The master has no lien on the ship for a liability, or expense he has incurred

for repairs during the voyage. *Hussey v. Christie*, 9 East, 426.

(c) *Duties of.*

(c 1) *On a sale of ship and cargo.*

If a ship and cargo are sold as a security for advances, and the captain, on being made acquainted with the fact, writes to the vendees as his owners, who return him no answer, it seems, that he would be justified in afterwards paying the vendor the proceeds. The vendee, by his silence and neglect to act as the owner, shews that he does not mean to take possession. *Mair v. Glennie*, 4 M. & S. 247. But where the sale is not by way of mortgage, but absolute, the rule may be different. *Ibid.*

(c 2) *Where a delivery of the cargo is prevented.*

Seem, that where a delivery is prevented, unless by the owner, the master is not justified in throwing the cargo overboard. *Christy v. Row*, 1 Taunt. 300.

(d) *Liabilities of.*

(d 1) *For necessaries supplied.*

1. The master of a vessel is only chargeable for necessaries supplied, where they have been furnished on his contract and credit; not, therefore, where having been ordered by the owners before they have been sent on board, after his appointment to the vessel. *Farmer v. Davies*, 1 T. R. 108.

2. The master of a vessel, who employs a shipwright to repair it, is, unless he otherwise stipulates, liable to him, as well as are his owners. *Hussey v. Christie*, 9 East, 426.

(e) *Of the bond by, under 26 Geo. III, c. 40.*

The bonds given by masters of vessels, under 26 Geo. III, c. 40, are continuing bonds, and remain in force as long as the same person is master of the same ship; but not when he becomes master of any other vessel. It is not necessary, therefore, that a fresh bond should be given on every voyage made by the vessel while in his charge, for the same bond covers all voyages made in her by him, and may be sued on for a breach of the conditions, during any one or more of them. *Rex v. McLeod*, 3 Price, 203.

IV. RELATIVE TO SEAMEN.

(a) *Contracts of hire.*(a 1) *Construction of.*

Under a clause in the ship's articles, that the seamen may leave at the end of three months, if the ship is in port, or in perfect safety, of which the captain is to be the sole judge; if the ship is in port at the end of three months, they may leave without his permission. *Neave v. Pratt*, 2 N. R. 408.

V. RELATIVE TO THE SUPERCARGO.

(a) *Authority of.*

1. A supercargo, unless his authority be expressly or impliedly restrained, is invested with complete controul over the cargo, and every thing which immediately concerns it, even whilst the vessel is in England. *Davidson v. Gwynne*, 12 East, 381.

2. Where the destination of a chartered vessel is to be as directed by the freighter or his agents, a supercargo on board has the same authority in this respect as his principal, even whilst the vessel is in England. *Davidson v. Gwynne*, 12 East, 381.

VI. RELATIVE TO WAGES. (*Et vide supra.*)(a) *Contracts relative to.*(a 1) *Construction of.*

A contract by foreign seamen, that they will not sue the master in foreign courts, is not limited to the duration of the voyage. *Gienar v. Meyer*, 2 H. B. 503.

(b) *Conditions of the right to.*

No wages are due to a sailor unless freight is earned. *Abernethy v. Laudale*, Dougl. 539.

(c) *Increase of.*(c 1) *In general.*

Held that a mate in a slave-ship, could not, on the ground of a verbal promise, claim the perquisite of the price of a negro slave beyond the wages due to him by certain written articles of agreement executed between the master, officers, and crew. *White v. Wilson*, 2 B. & P. 116.

(c 2) *Under 37 Geo. III, c. 73.*

The license under 37 Geo. III, c. 93, s. 3, empowering the captain to give more

than double monthly wages for seamen, must specify the sum. *Rodgers v. Lacy*, 2 B. & P. 57.

(d) *Apportionment of.*

1. A seaman disabled in the course of his duty, pending the voyage, is entitled to wages for the whole voyage. *Chandler v. Grieves*, 2 H. B. 606, n.

2. Where it is stipulated that seamen "shall not demand, or be entitled to their wages, or any part thereof," until arrival of the ship in her port of discharge; they cannot on a loss before arrival, claim wages *pro rata*, on the ground that freight had been earned at an intermediate port. *Appleby v. Dods*, 8 East, 300.

(e) *Loss or forfeiture of.*(e 1) *By loss or capture.*

If the ship be lost or captured before the end of the voyage, the wages are lost. And *query*, whether by a ransom, the right to wages for the period antecedent to the capture is revived. *Yates v. Hall*, 1 T. R. 79; *Hemaman v. Bawden*, 3 Burr. 1844.

(e 2) *By hostile detention.*

In the case of a hostile detention by a foreign state, if the ship ultimately performs her voyage, the sailor, though a foreigner, is entitled to wages during his detention, though he be forcibly taken from the ship by the orders of a foreign prince. *Beale v. Thompson*, 4 East, 546; 1 Smith, 144; *Johnson v. Broderick*, 4 East, 566; 1 Smith, 153; reversing the judgment in 3 B. & P. 405.

(e 3) *By the embezzlement of another seaman.*

One seaman serving under articles pursuant to 37 Geo. III, c. 73, does not lose his whole wages, nor, *semble*, even a proportionable part, by another embezzling the cargo. *Thompson v. Collins*, 1 N. R. 347.

(e 4) *Under 2 Geo. II, c. 36.*

1. To entitle the master to deduct a month's wages under 2 Geo. II, c. 36, s. 6, he must prove that the seaman quitted the ship without leave in writing. *Frontine v. Frost*, 3 B. & P. 302.

2. Before the master can insist upon the forfeiture of a month's wages for leaving the ship without leave in writing, he

must have debited himself to Greenwich hospital in the amount, pursuant to st. 2 Geo. II, c. 36, s. 9. *Frontine v. Frost*, 3 B. & P. 302.

(e 5) *In whole or in part.*

1. An officer or sailor who has agreed to serve on board a letter of marque for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she complete her voyage, although he shall have been sent from the ship before the capture as prize-master on board a prize taken by her in the course of the voyage. *Abernethy v. Laudale*, Dougl. 539.

2. The whole of a seaman's wages are not forfeited under 2 Geo. II. c. 36, s. 3, by his leaving the ship after her arrival, but before she is moored. *Frontine v. Frost*, 3 B. & P. 302.

(f) *Of the action for.*

(f 1) *By an executor,—when not paid over to Greenwich Hospital.*

The representatives of a deceased seaman, may sue the captain for the excess of wages due beyond the sum paid over by him to Greenwich Hospital, pursuant to st. 37 Geo. III, c. 73. *Armstrong v. Smith*, 1 N. R. 299.

(f.2) *Evidence in.*

In an action for seaman's wages, it is not incumbent on the plaintiff to prove that the ship earned freight. *Brown v. Milner*, 7 Taunt. 319.

VII. AS TO WHAT SHIPS ARE ENTITLED TO REGISTRY.

A ship, which appears from the sentence of condemnation to have been confiscated for engaging in the slave trade, contrary to 46 Geo. III, c. 52, is not entitled to registry under 26 Geo. III, c. 60, though the judge has certified that the ship was condemned as lawful prize. *Res v. Collector of Customs*, 1 M. & S. 262.

VIII. AS TO WHAT SHIPS MUST BE REGISTERED.

A foreign built ship British owned, need not be registered. *Long v. Duff*, 2 B. & P. 209.

IX. ON THE SALE OF.

(a) *Relative to the form of.*

(a 1) *In general.*

1. A title, whether legal or equitable, to ships within st. 26 Geo. III, c. 60, can only be acquired by a bill of sale in writing, pursuant to that statute. *Camden v. Anderson*, 5 T. R. 709.

2. A ship, whilst it specifically subsists, and is capable of being used as such, for the purposes of navigation, is an object of the Registry Acts. *Reid v. Darby*, 10 East, 143.

3. Sect. 15 & 16 of st. 34 Geo. III, c. 68, on the transfer of ships, extend to every case of transfer; therefore, to one where the ship though not at sea, and though absent from her own port, is not so absent but that an indorsement on the certificate of registry may be made. *Hayton v. Jackson*, 8 East, 511.

4. Sect. 16 of stat. 34 Geo. III, c. 16, applies as well to the sale of the entire ship as a share or share. *Hubbard v. Johnstone*, 3 Taunt. 177.

5. A bill of sale, which does not truly recite the certificate of registry, is a nullity. *Westerdale v. Dale*, 7 T. R. 306.

6. The deed of assignment need not recite the indorsements on the certificate of registry. *Capadose v. Codnor*, 1 B. & P. 483.

7. The delivery by the party of a copy of the bill of sale, for the purpose of entry, memorandum, and notice, pursuant to stat. 34 Geo. III, c. 68, s. 16, is essential to the transfer of a ship at sea. *Heath v. Hubbard*, 4 East, 110; 3 Taunt. 177.

8. The names of the proper officers whose signatures are necessary to give validity to a certificate of registry, need not be mentioned in a bill of sale reciting the certificate. *Rollston v. Smith*, 4 T. R. 161.

9. The acts by the officer of the outport to indorse the entry of the transfer on the oath, on which the original certificate was obtained,—to make a memorandum thereof,—and to notify the same to the commissioners in London, pursuant to 34 Geo. III, c. 68, s. 16, are not essential to the transfer of a ship at sea. *Heath v. Hubbard*, 4 East, 110.

10. The property passes by the indorsement on the certificate, notwithstanding an omission by the proper officer to trans-

mit a copy thereof to the office in London. *Underwood v. Miller*, 1 Taunt. 387.

11. The stat. 34 Geo. III, c. 68, s. 15, relative to the sale of ships, enacts, "that upon any alteration of property in any ship, &c. the indorsement upon the certificate of registry shall be made in the form there expressed, and shall be signed by the persons transferring the property by sale, contract or agreement for sale, or some person authorized by them, and a copy of such indorsement shall be delivered to the person authorized to make registry, otherwise such sale, contract, or agreement, shall be utterly null and void to all intents and purposes whatever;" not limiting any time for the delivery. The delivery is not a condition precedent to the vesting of the property, so that if it be done in a reasonable time, the requisition in the statute is satisfied. The property passes on the execution of the bill of sale, and the regulations of the statute are in the nature of conditions subsequent, having the effect of defeating property already vested, from what they require not having been done in a reasonable time. *Palmer v. Moser*, 2 M. & S. 43.

12. An indorsement on the certificate of registry, and a delivery, by the vendee, of a copy of such indorsement to the persons authorized to make registry, pursuant to the statutes, is the only mode of effectuating the transfer of a ship at sea. *Bloxam v. Hubbard*, 5 East, 407; 1 Smith, 487; 3 Taunt. 177.

13. *Semble*, the indorsement should be made at the time of making the bill of sale, or in a reasonable time afterwards. *Moss v. Mills*, 2 Smith, 227; 6 East, 144.

14. The course to be pursued under the Registry Acts on the transfer of a ship at sea, registered at one port to a purchaser residing at another, is, to register the ship *de novo*, in her new port. Nor need she return to her old port, that an indorsement of the transfer may be made on her certificate; nor need a copy of the bill of sale be sent there by the purchaser; nor need an indorsement of the transfer be made on her certificate within ten days after her arrival in England. *Hubbard v. Johnstone*, 3 Taunt. 177.

15. The indorsement of a bill of sale of a ship, on the transfer of property therein, is not valid within the registry acts, made on a register which is cancelled

and void, even though it was so cancelled in consequence of obtaining a former register *de novo* which was invalid. *Moss v. Mills*, 2 Smith, 227; 6 East, 144.

16. The stat. 26 Geo. III, c. 60, intending that British ships should be entitled to certain privileges and benefits, by way of securing them to the owners of those ships only, enacted, that there should be a certificate of the registry of the ship, and that "when and so often as the property in any ship belonging to any of his majesty's subjects, shall be transferred to any other of his majesty's subjects, the certificate of the registry of such ship shall be truly and accurately recited in words at length in the bill or instrument of sale thereof, otherwise such bill of sale, shall be utterly null and void."—The owner of a ship at sea executed a bill of sale, reciting the certificate of registry as it was abstracted in one of the public offices as required, but in which abstract the date of the condemnation (for it was a prize) was mistaken, in that 1783 was put for 1782, the true date, and the one mentioned in the original certificate of registry which was with the ship, as it ought to be. It appeared upon the face of the recital of the registry, that the date was mistaken, though not in what particular. Held that, under these circumstances, the bill was good. *Bolleson v. Smith*, 4 T. R. 161.

(b) *By a part-owner of his share.*

A part-owner may transfer his share, without expressing in the indorsement on the certificate, that the transfer is of his entire interest. *Underwood v. Miller*, 1 Taunt. 387.

(c) *On a transfer by operation of law.*

The Register Acts are not applicable to a transfer by operation of law; thus, under a bankruptcy. *Bloxam v. Hubbard*, 5 East, 407; 1 Smith, 487.

(d) *Of delivery thereon.*

A ship at sea may be effectually transferred, provided the vendee takes possession, by himself or his agent, so soon as he has an opportunity. *Mair v. Glennie* 4 M. & S. 246; *Addis v. Baker*, 1 Anst. 222.

(e) *To what period it has relation.*

The property does not pass by the bill

of sale, but only on completion of the acts required by the Statutes of Registry. *Moss v. Charnock*, 2 East, 399; *Ritchie v. St. Barbe*, 4 Taunt. 768; 3 Taunt. 208, *contra*.

(f) *Of collateral contracts connected with.*
(f 1) *Whether avoided by the avoidance of.*

A mortgagor's covenant for repayment in a bill of sale, void for misreciting the certificate of registry, is available. *Kerrison v. Cole*, 8 East, 231.

(g) *To a trustee.*

The title to a ship is, at all events, vested in the trustee under a bill of sale in trust for persons not named. *Heath v. Hubbard*, 4 East, 110; 3 Taunt. 177.

(h) *Executory agreement for,—its form.*

Whether an executory agreement for the sale of a ship, must recite the registry under the 26 Geo. III, c. 60, s. 17, *quære*. *Addis v. Baker*, 1 Anst. 222.

X. ON THE MORTGAGE OF. (And see *supra*).

(a) *What considered as.*

1. An instrument under seal, executed by the master (who was also owner) for the repayment of money borrowed for repairing the vessel, thereby stipulating that "the vessel should be and remain a security by way of bottomry, for the repayment thereof, and that as well his executors, &c. as the said vessel, should be bound in the penal sum of so much," operates as a mortgage of the vessel; so that the party may take possession; after which, his right is not defeasible by a subsequent execution at the suit of another creditor. *Ladbroke v. Crickett*, 2 T. R. 649.

2. A bill of sale, with a stipulation that it was made as a lien or security for money lent, and that the vendee might sell and transfer, is a contract, not of lien, but of mortgage or pledge. *Wilson v. Heather*, 5 Taunt. 642.

(b) *Form of.*

1. A bill of sale, absolute upon the face of it, of a ship by one British subject to another, though the ship is at sea, and though there be a collateral agreement denoting that the transaction is a mortgage only, is void by st. 26 Geo. III, c. 60, s. 17, unless it recites the certifi-

cate of registry. *Rollaston v. Hibbert*, 3 T. R. 406.

2. The transfer of a ship by way of mortgage or pledge, is within the Ship Registry Acts. *Wilson v. Heather*, 5 Taunt. 642.

XI. OF LIEN THEREON (and see *supra*).

(a) *Form of its creation.*

A. commissions B. to sell a ship for him, and having deposited her register with him for that purpose, becomes bankrupt. Held, that B. has a lien on the register against the assignees of A. for the amount of his demand against A., consisting partly of charges incurred on the ship's account, and partly of other charges; and that this was not such a transfer of the property as to bring the case within the meaning of the Register Acts. But the ship, when put up to sale, having been bought in; held that B. was not entitled to a commission on the sale of her. *Mestaer v. Atkins*, 1 Mars. 76; 5 Taunt. 381.

(b) *Arising from implication.*

No lien is created by an instrument which imports upon the face of it to be a contract of sale, but which is void as such; since that would be to substitute a different contract to what the parties intended. Therefore, a creditor to whom a ship at sea is sold by a bill of sale, void from not reciting the certificate of registry under st. 26 Geo. III, c. 60, s. 17, requires no lien for his demand by taking possession on its return to port. *Rollaston v. Hibbert*, 3 T. R. 406.

XII. CONTRACTS RELATIVE TO.

(a) *Construction of.*

A contract to return a sum of money if B., a seaman, did not proceed with such a vessel on such a voyage, is not an undertaking that B. is a seaman. *Levy v. Haw*, 1 Taunt. 65.

(b) *Discharge of.*

1. The value of repairs may be recovered, though a ship be burnt in dock. *Menetone v. Athawes*, 3 Burr. 1592.

2. A covenant to pay the plaintiff a certain sum of money yearly, in lieu of his share of the profits of a vessel as a part-owner, is not discharged by the capture of the vessel, provided the property

in her be not altered by condemnation. *Grigg v. Stoker, Forrest* 4.

XIII. DECREES AND JUDGMENTS RELATIVE TO.

(a) *For the sale thereof.*

A decree by a Vice Admiralty court, made upon the petition of the master of a ship, reported upon survey not seaworthy, or repairable so as to carry the cargo to its place of destination, unless at an expense exceeding the value of the ship when repaired for the sale thereof, is void. *Reid v. Darby*, 10 East, 143.

XIV. RELATIVE TO THE FORFEITURE OF.

(a) *Cause of,—in relation to the party offending.*

A private vessel is forfeited by the contraband traffic of an officer placed in command by the Board of Admiralty. *Blewitt v. Hill*, 13 East, 13.

(b) *Seizure for.*

(b 1) *Its legal effect to divest the property.*

The seizure of a ship forfeited under the Navigation Act, divests the property. *Wilkins v. Despard*, 5 T. R. 112.

(b 2) *Re-delivery thereon.*

1. Seven terms having elapsed without the Attorney General's bringing on the trial of an information for a seizure, the court directed the vessel to be returned without security. *The Attorney General v. Richards*, 3 Anst. 753.

2. In an information upon seizure of a vessel, upon affidavit of injury from delay, a writ of delivery was granted on security, after two terms; the defendant waited three terms more without a trial, and then moved to discharge the recognizance; the court held that the crown ought to have six terms in all; and that a reasonable cause of delay (absence of witnesses abroad) should be allowed after the six terms. *The Attorney General v. Denham*, 3 Anst. 805.

XV. MISCELLANEOUS STATUTES RELATIVE TO.

(a) 24 Geo. III, c. 47, & 27 Geo. III, c. 32.

The statutes 24 Geo. III, c. 47, & 27 Geo. III, c. 32, do not so clearly mark the distinctions between the different sorts

of vessels there mentioned, as to supersede evidence upon it. *Gossley v. Barlow*, 1 Anst. 23.

(b) 34 Geo. III, c. 68, s. 18.

A refusal by the master to deliver up to the owner the certificate of registry, is no offence within st. 34 Geo. III, c. 68, s. 18. *Rex v. Pirley*, 13 East, 91.

(c) 49 Geo. III, c. 60, s. 1.

A ship purchased by a British subject from an enemy, under a license, is "the ship of a country in amity," within st. 49 Geo. III, c. 60, s. 1. *Sewell v. Royal Exchange Assurance Company*, 4 Taunt. 856.

SILK STUFFS.

BOUNTY ON THE EXPORTATION OF.

(a) Under 8 Geo. I, c. 15.

Articles made from the second or peg waste, are not entitled to. *Attorney General v. Smythies*, Wightw. 399.

SILVER PLATE.

STATUTE RELATIVE TO THE STANDARD OF.

(a) 28 Edw. I, c. 20,—whether repealed.

No. *Rex v. Jackson*, Cowp. 297.

SLANDER.

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VI. OF SLANDER OF TITLE.

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(b) *Of the declaration*.

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(d) *Of the evidence*.

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I. OF SLANDER IN GENERAL.

(a) *Essentials of*.

(a 1) *A malicious motive*.

Is an essential. So that words spoken in confidence, *Edmonson v. Stephenson*, B. N. P. 8; *Herve v. Dowson*, Ibid; or in passion merely, *Pinfold v. Westcote*, 2 N. R. 335, are not actionable.

(b) *Rules of construction*.

Words shall be interpreted in that sense in which they are commonly apprehended. *Carslake v. Mappledoram*, 2 T. R. 473; *Woolnoth v. Meadows*, 5 East, 463; 2 Smith, 28; *Roberts v. Camden*, 9 East, 93. Only that when equally susceptible of two senses, the one not defamatory shall be preferred; hence, to say that another is forsworn is not actionable. *Holt v. Scholefield*, 6 T. R. 691.

(c) *Nature of an actionable charge ascertained*.

Any words from which damage results. *Moore v. Meagher*, 1 Taunt. 44.

(d) *Relative to the publication of another's slander*.

The only conditions upon which the republication is justifiable (admitting that it is so) are,—1. That the name of the original defamer was given up at the time. *Davis v. Lewis*, 7 T. R. 17; *Woolnoth v. Meadows*, 5 East, 463; 2 Smith, 28. —2. That the identical expressions used were repeated. *Maitland v. Golding*, 2 East, 426.

(e) *Of the declaration*.

(e 1) *Statement of the words*.

1. They should be given as they were spoken, since proof of equivalent words will not do. *Maitland v. Goldney*, 2 East, 434. Nor will it be allowed to state what

in legal effect they amounted to, as, that the accusation (being "you are not worth a penny") was of insolvency. *Cook v. Cox*, 3 M. & S. 110. In which case judgment was arrested after verdict.

2. See VARIANCE, *infra*.

(e 2) *Entirety of the charge.*

The plaintiff need not prove all the words laid. *Compagnon v. Martin*, 2 Blk. 790; *Maitland v. Goldney*, 2 East, 434.

(e 3) *Averment of falsehood.*

It is implied in the words "malicious, injurious and unlawful." *Rowe v. Roach*; *Same v. Hoar*, 1 M. & S. 304.

(e 4) *Averment of and concerning.*

Is essential to connect the introductory matter with the defamation; nor will an innuendo supply its place. *Hawkes v. Hawkey*, 8 East, 427.

(e 5) *Of the innuendo.*

It serves to explain, by reference to introductory matter, an ambiguous charge. *Rex v. Aylett*, 1 T. R. 63. It may explain, by adding material circumstances implied by the introduction, *Ibid*. And if those circumstances are not implied, still their addition may be rejected as surplusage, provided they are not essential to the case, *Ibid*; or blended with the preceding matter. *Roberts v. Camden*, 9 East, 93.

(e 6) *Of rejecting an averment repugnant to the charge.*

Words actionable *per se*, are not made less so because laid as spoken of the plaintiff in a particular relation. *Harwood v. Astley*, 1 N. R. 47.

(e 7) *Statement of special damage.*

If it consists in the loss of customers, their names must be given. *Hartley v. Herring*, 8 T. R. 130. And a general description, where the loss is the only cause of action, is not aided by verdict. *Feize v. Linder*, 3 B. & P. 372.

(f) *Of the evidence.*

(f 1) *Presumption of malice and falsehood.*

The general rule is, that malice and falsehood will be implied; an exception is where the defamation was an answer by a master to one demanding the character

of his former servant; here, the servant must prove malice and falsehood. *Wea-therston v. Hawkins*, 1 T. R. 110; *Rogers v. Clifton*, 3 B. & P. 587; *Hargrave v. Le Breton*, 4 Burr. 2425.

(g) *Of costs.*

(g 1) *In relation to special damage.*

Where all the words are actionable *per se*, and the verdict under 40s., an allegation of special damage will not carry full costs. *Surman v. Shelleto*, 3 Burr. 1688; *Collier v. Gaillard*, 2 Blk. 1062. *Secus*, where only some are so, though the special damage is laid as occasioned by all. *Savile v. Jardine*, 2 H. B. 531.

(g 2) *In relation to a plea in justification.*

Though found for the plaintiff, he is not *therefore* entitled to full costs. *Halford v. Smith*, 4 East, 567.

II. OF SLANDER OF THE PERSONAL CHARACTER.

(a) *Nature of an actionable charge ascertained.*

(a 1) *General rule.*

Unless attended with special damage, it must impute the commission of a crime punishable by law. *Onslow v. Horne*, 3 Wils. 186; 2 Blk. 750. *Feize v. Linder*, 3 B. & P. 372. The imputation of moral deficiency is not actionable, *Ibid*.

(a 2) *Examples of words actionable.*

1. "He was put into the round-house for stealing ducks at X." *Beavor v. Hides*, 2 Wils. 300.

2. "I am convinced that you are guilty (innuendo of the death of A.) and rather than you should go without a hangman, I will hang you." *Peake v. Oldham, Cowp.* 275; 2 Blk. 959.

(a 3) *Examples of words not actionable.*

1. The calling one a swindler. *Savile v. Jardine*, 2 H. B. 531.

2. "I will take him to Bow-street on a charge of forgery." *Harrison v. King*, 7 Taunt. 431.

(b) *Of the declaration.*

(b 1) *Example of uncertainty in the charge being aided by verdict.*

A colloquium of the death,—a charge of "being guilty," innuendo of the murder of A. *Peake v. Oldham, Cowp.* 275.

III. OF SLANDER FROM THE IMPUTATION OF DISEASE.

(a) *Nature of an actionable charge ascertained.*

The imputation of having had an infectious disease, is not actionable. *Carlake v. Mappedoram*, 2 T. R. 473.

IV. OF SLANDER IN OFFICE.

(a) *Nature of an actionable charge ascertained.*(a 1) *General rule.*

Words which may occasion the loss of an office of profit, are actionable. *Onslow v. Horne*, 3 Wils. 187; 2 Blk. 750.

(a 2) *Example.*

Words charging the having given 200*l.* for a warrant to be purser of a man of war, not specifying or implying to whom it was given, are not actionable. *Purdy v. Stacey*, 5 Burr. 2698.

(b) *Of the declaration,—by a dissenting minister.*

He need only aver that he is such, without shewing that he is qualified pursuant to the statute. *Hartley v. Herring*, 8 T. R. 130.

V. OF SLANDER OF THE PROFESSIONAL CHARACTER.

(a) *Nature of an actionable charge ascertained.*(a 1) *General rule.*

Words of an injurious tendency to one in a profession are actionable. *Onslow v. Horne*, 3 Wils. 187; 2 Blk. 750.

(a 2) *Example,—words of an attorney.*

"What, does he pretend to be a lawyer? he is no more a lawyer than the devil," actionable. *Day v. Buller*, 3 Wils. 59.

(b) *Plea in justification to an action for.*

Where the charge is of general misconduct, the plea must specify the particular instances. *Holmes v. Catesby*, 1 Taunt. 543.

VI. OF SLANDER OF TITLE.

(a) *Essentials of,—a malicious motive.*

Is so. *Hargrave v. Le Breton*, 4 Burr. 2422; *Smith v. Spooner*, 3 Taunt. 246.

SLAVERY.

(b) *Of the declaration.*(b 1) *Averment of title.*

Semble must be special; and not a general statement of lawful possession. *Roue v. Roach*; *Same v. Hoar*, 1 M. & S. 304.

(c) *Of the plea.*(c 1) *The general issue.*

Is proper where the defence is a claim of title. *Smith v. Spooner*, 3 Taunt. 246.

(c 2) *Justification under the authority of adventurers.*

The plea must state their names and relation to the property. *Roue v. Roach*; *Same v. Hoar*, 1 M. & S. 304.

(d) *Of the evidence.*(d 1) *Presumption of malice.*

Must be drawn from all the circumstances of defendant's conduct and situation; and not formed by reference to the standard of action by which a man of sound judgment would regulate his conduct. *Pitt v. Donovan*, 1 M. & S. 639.

SLAVERY.

I. WHETHER RECOGNIZED BY THE ENGLISH LAW, p. 920.

II. CONTRACTS RELATIVE TO, p. 920.

III. STATUTE RELATIVE TO THE SLAVE TRADE.

(a) 31 Geo. III, c. 54, s. 7, p. 921.

I. WHETHER RECOGNIZED BY THE ENGLISH LAW.

No. Hence slaves, by landing in England, are here emancipated. *Somerset v. Stewart*, Loft. 1. Excepting the case where a man confesses himself a villain in gross, in a court of record. *Ibid.*

II. CONTRACTS RELATIVE TO.

Made in England, to take effect abroad where slavery is allowed, are valid. *Somerset v. Stewart*, Loft. 1. And made by a slave abroad in order to his manumission, may be enforced here. *Williams v. Brown*, 3 B. & P. 69.

III. STATUTE RELATIVE TO THE SLAVE TRADE.

- (a) 31 Geo. III, c. 54, s. 7.

The captain's certificate must be attested by the owner of the ship in which he served. *Farmer v. Legg*, 7 T. R. 186.

SOUTHAMPTON POOR'S ACT.

MANDAMUS TO THE LATE TREASURER OF.

Does not lie to compel repayment, pursuant to an order of sessions, of money paid over by the guardians' direction. *Rex v. Shaw*, 5 T. R. 549.

SOUTH-SEA COMPANY.

I. IN RELATION TO THEIR LICENSES.

- (a) *Whether annexed to the particular vessel*, p. 921.
 (b) *Retrospective operation of*, p. 921.
 (c) *When unnecessary*, p. 921.

II. IN RELATION TO THEIR BOOKS.

- (a) *Whether evidence of their license granted*, p. 921.

III. STATUTES RELATIVE TO.

- (a) 42 Geo. III, c. 77, p. 921.
 (b) 47 Geo. III, sess. 1, c. 23, p. 921.

I. IN RELATION TO THEIR LICENSES.

- (a) *Whether annexed to the particular vessel*.

Yes. *Cowie v. Barber*, 4 M. & S. 16.

- (b) *Retrospective operation of*.

They cannot operate retrospectively. Therefore, the insurance of a ship trading within the exclusive limits, is not made available by a subsequent license. *Cowie v. Barber*, 4 M. & S. 16.

- (c) *When unnecessary*.

For the carriage home, in a king's ship, of bullion, the proceeds of a licensed adventure. *Hodgson v. Fullarton*, 4 Taunt. 787.

II. IN RELATION TO THEIR BOOKS.

- (a) *Whether evidence of their license granted*.

Yes. *Hodgson v. Fullarton*, 4 Taunt. 787.

III. STATUTES RELATIVE TO.

- (a) 42 Geo. III, c. 77.

The open trade sanctioned thereby, may be prosecuted without fishing. *Jacob v. Jansen*, 3 Taunt. 534.

- (b) 47 Geo. III, sess. 1, c. 23.

1. Has not a retrospective operation. And repeals the st. 9 Ann, c. 21, only in the particular cases proposed. *Wilkinson v. Londonsack*, 3 M. & S. 117.

2. Does not legalize a trading, and therefore not an insurance thereon, within the exclusive limits, to a place known to have been captured from, but which, though the fact was unknown, had been recaptured by, the enemy. *Toulmin v. Anderson*, 1 Taunt. 227.

SOUTHWARK, COURT OF CONSCIENCE.

I. RELATIVE TO ITS JURISDICTION.

- (a) *In relation to the subject matter*, p. 921.
 (b) *Whether conferred by residence within the jurisdiction*, p. 921.
 (c) *Suggestions relative to*, p. 922.

II. STATUTES RELATIVE TO.

- (a) *Of the exception therein*, p. 922.

I. RELATIVE TO ITS JURISDICTION.

- (a) *In relation to the subject matter*.

Has none over causes arising from negligence or misfeasance. *Lawson v. Moggridge*, 1 Taunt. 396.

- (b) *Whether conferred by residence within the jurisdiction*.

Yes. Though unknown to plaintiff, and though the defendant carry on his business, and the cause arose without. *Spencer v. Holloway*, 15 East, 647.

(c) *Suggestions relative to.*

The course in relation to costs, is by suggestion after verdict or inquiry. *Barney v. Tubb*, 2 H. B. 350; and before final judgment, *Ibid.* And the preliminary affidavit must state as well, that defendant is liable to be summoned, &c. as that he is a resident, &c. *Ibid.*

II. STATUTES RELATIVE TO.

(a) *Of the exception therein.*

It embraces all cases, and not merely those in which the reduction is by a set off. *Fountain v. Young*, 1 Taunt. 60. But a reduction, stipulated by the terms of the original contract, is out of it. *Porter v. Philpot*, 14 East, 344.

SPIRITUOUS LIQUORS.

I. IN RELATION TO RETAIL DEALERS IN.

(a) *A justice's license,—whether essential to, p. 922.*

II. IN RELATION TO THE REMOVAL OF.

(a) *Extent of forfeitures resulting from, p. 922.*

III. IN RELATION TO THE ILLEGAL SALE OF.

(a) *Entirety of the contract for the price, p. 922.*

I. IN RELATION TO RETAIL DEALERS IN.

(a) *A justice's license,—whether essential to.*

Yes; notwithstanding the st. 9 Geo. III, c. 6, and that the dealer has an excise license. *Rex v. Downes*, 3 T. R. 560.

II. IN RELATION TO THE REMOVAL OF.

(a) *Extent of forfeitures resulting from.*

The removal of a larger quantity than expressed in the permit, though without fraud, incurs a forfeiture of the whole. *Hall v. Dracord*, 2 Blk. 1289.

III. IN RELATION TO THE ILLEGAL SALE OF.

(a) *Entirety of the contract for the price.*

A bill given as well for the price of liquor sold in quantities under 20s. value,

as for money lent; is void in toto. *Scott v. Gilmore*, 3 Taunt. 226.

STAGE COACH, DRIVER OF.

CONVICTION OF, UNDER 28 GEO. III, c. 57.

(a) *In default of appearance, p. 922.*(b) *Form of, p. 922.*(a) *In default of appearance.*

Is allowable. *Rex v. Barker*, 3 East, 504.

(b) *Form of.*

It need not allege that he was employed by the owner. *Rex v. Barker*, 3 East, 504.

STAMPS.

I. OF CERTAIN GENERAL RULES.

(a) *Identity of a stamp with the instrument, p. 924.*(b) *Essential nature of a stamp.*(b 1) *In the case of a bill or note, p. 924.*(b 2) *In the case of a deed, p. 924.*(b 3) *Where the instrument forms the basis or consideration of a contract, p. 924.*(c) *Relative to the time of stamping, p. 924.*(d) *Of specific and ad valorem stamps, p. 924.*(e) *Of stamping an antient writing with the impression now in use, p. 924.*(f) *Of single and double stamps.*(f 1) *In the case of a warrant of attorney defeazanced, p. 924.*(f 2) *In the case of a composition deed, p. 924.*(f 3) *In the case of separate obligors in one bond, p. 924.*(f 4) *In the case of an agreement by underwriters to refer to arbitration, p. 924.*

(f 5) *In the case of an agreement relative to prize shares, p. 924.*

(f 6) *In the case of an agreement by several for a subscription to construct a dock, p. 925.*

(g) *On the application of a single stamp.*

(g 1) *In the case of contracts, p. 925.*

(g 2) *In the case of affidavits, p. 925.*

(g 3) *In the case of admissions to the freedom of a corporation, p. 925.*

II. ON THE CLASSING OF WRITTEN INSTRUMENTS WITH REFERENCE TO STAMPING.

(a) *Whether an award or a deed, p. 925.*

(b) *Whether an appraisement or an award, p. 925.*

(c) *An instrument authorizing the execution of a deed, p. 925.*

III. OF INSTRUMENTS LIABLE OR NOT TO THE DUTY.

(a) *Agreements in general, p. 925.*

(b) *A schedule annexed, p. 925.*

(c) *Agreement or memorandum, p. 925.*

(d) *Agreements under 20 l., p. 925.*

(e) *Contracts relating to the sale of goods.*

(e 1) *What are such, p. 925.*

(e 2) *What are not such, p. 925.*

(f) *Letters between merchants, p. 925.*

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(h) *Appointment of an umpire, p. 926.*

(i) *Bill of lading, p. 926.*

(k) *Lease, p. 926.*

(l) *Assignment of a lease, p. 926.*

(m) *Apprentice deed by a charity, p. 926.*

(n) *Cognovit, p. 926.*

(o) *Law proceedings.*

(o 1) *Declaration filed, and copy delivered in the Exchequer, p. 926.*

(o 2) *Copy of a judgment reversing a decree, p. 926.*

(p) *Note for a prisoner's allowance under the Lords' Act, p. 926.*

(q) *A commission of bankruptcy, p. 926.*

(r) *Legacies, p. 926.*

(s) *Bills and notes drawn abroad in blank, p. 926.*

(t) *Agreement in England, to accept a bill drawn abroad, p. 926.*

IV. ON THE ADMISSIBILITY IN EVIDENCE OF UNSTAMPED INSTRUMENTS.

(a) *General rule, p. 926.*

(b) *On notice or refusal to produce the part stamped, p. 926.*

(c) *Made abroad, p. 926.*

(d) *For collateral purposes.*

(d 1) *What are such, p. 927.*

(d 2) *What are not such, p. 927.*

V. ON THE ADMISSIBILITY OF PAROL EVIDENCE IN LIEU OF UNSTAMPED INSTRUMENTS.

(a) *General rule, p. 927.*

(b) *In lieu of a bill or note, p. 927.*

VI. ON THE RE-STAMPING OF WRITTEN INSTRUMENTS AFTER ALTERATION.

(a) *In the furtherance of the original intention, p. 927.*

(b) *In the case of a policy.*

(b 1) *When necessary, p. 927.*

(b 2) *When unnecessary, p. 927.*

VII. OF THE DUTY PAYABLE.

(a) *On leases, p. 927.*

(b) *On policies, p. 927.*

(c) *On bonds, p. 927.*

(d) *On apprenticeship deeds.*

(d 1) *By what act imposed, p. 927.*

(d 2) *In relation to a benefit,—what is not, p. 927.*

(e) *On a warrant of attorney, p. 928.*

(f) *On law proceedings*, p. 928.

(g) *On legacies*.

(g 1) *Specific*, p. 928.

(g 2) *Residuary*, p. 928.

VIII. ON THE FORM OF THE INSTRUMENT WITH REFERENCE TO THE STAMP ACTS.

(a) *An apprenticeship deed*, p. 928.

IX. OF PENALTIES UNDER THE STAMP ACTS.

(a) *Under 1 Ann, sess. 2, c. 22*, p. 928.

(b) *Of compounding actions for*.

(b 1) *Notice of motion to the Stamp Office,—whether necessary*, p. 928.

(b 2) *Form of motion*, p. 928.

X. RELATIVE TO THE FORGERY OF STAMPS.

(a) *What considered as*, p. 928.

(b) *Form of indictment for*, p. 928.

I. OF CERTAIN GENERAL RULES.

(a) *Identity of a stamp with the instrument*.

Having been used for an effectual purpose, it cannot afterwards be used for another, though of a precisely similar nature to the first. *Hammond v. Foster*, 5 T. R. 635.

(b) *Essential nature of a stamp*.

(b 1) *In the case of a bill or note*.

An unstamped bill or note is a nullity, and therefore imposes no obligation to present it. *Wilson v. Vysar*, 2 Taunt. 288.

(b 2) *In the case of a deed*.

Is only essential to its admissibility in evidence. *Goodright v. Gregory*, Lofft. 341.

(b 3) *Where the instrument forms the basis or consideration of a contract*.

If the instrument cannot be stamped, the contract is void. *Jackson v. Warwick*, 7 T. R. 121.

(c) *Relative to the time of stamping*.

Is a circumstance altogether immaterial; a motion, therefore, founded on the want of a stamp, is defeated by a subsequent

stamping. *Burton v. Kirkby*, 2 Mars. 480; 7 Taunt. 174.

(d) *Of specific and ad valorem stamps*.

1. An *ad valorem*, or stamp of higher value, of an improper denomination, is not available, unless by statutory provisions. *Robinson v. Drybrough*, 6 T. R. 317; *Chamberlain v. Porter*, 1 N. R. 30.

2. A stamp of greater value than the one prescribed, is sufficient, provided that there is a stamp in the schedule of that identical amount, and that where the regular stamp is made up of different sums, imposed by different acts, and each sum is applicable to a different fund, appropriated to the public service, the stamp imposed is likewise applicable to the same funds, and in proportions not less than is the regular stamp. *Farr v. Price*, 1 East, 55; *Taylor v. Hague*, 2 East, 414. See 5 East, 312.

(e) *Of stamping an ancient writing, with the impression now in use*.

It may be done. *Doe, d. Dyke, v. Whittingham*, 4 Taunt. 20.

(f) *Of single and double stamps*.

(f 1) *In the case of a warrant of attorney defeazanced*.

The defeazance is covered by the stamp to the warrant. *Cawthorne v. Holben*, 1 N. R. 279.

(f 2) *In the case of a composition deed*.

Only one stamp is requisite, though each creditor executes separately. *Bowen v. Ashley*, 1 N. R. 278.

(f 3) *In the case of separate obligors in one bond*.

Where the obligation is for the self-same thing, only one stamp is requisite. *Bowen v. Ashley*, 1 N. R. 274.

(f 4) *In the case of an agreement by underwriters to refer to arbitration*.

The agreement and the award require only single stamps each. *Goodson v. Forbes*, 1 Mars. 525; 6 Taunt. 171.

(f 5) *In the case of an agreement relative to prize shares*.

Though several as to each person, one stamp only is requisite. *Baker v. Jardine*, 13 East, 235, n.

(f 6) *In the case of an agreement by several for a subscription to construct a dock.*

A single stamp is sufficient. *Davis v. Williams*, 13 East, 23, n.

(g) *On the application of a single stamp.*
(g 1) *In the case of contracts.*

A paper containing contracts by several persons, relative to different things, though stamped with a single stamp, is evidence for one where the stamp appears applicable exclusively to his name. *Powell v. Edmunds*, 12 East, 6; *Doe, d. Copley, v. Day*, 13 East, 241.

(g 2) *In the case of affidavits.*

That an affidavit, entitled in several causes, may be read, it must be impressed with a corresponding number of stamps. *Anon.* 3 Taunt. 469.

(g 3) *In the case of admissions to the freedom of a corporation.*

The first only of several admissions entered on one stamp, is good. *Gilby v. Lockyer*, Dougl. 217.

II. ON THE CLASSING OF WRITTEN INSTRUMENTS WITH REFERENCE TO STAMPING.

(a) *Whether an award or a deed.*

An award under seal, delivered as such, requires an award stamp only. *Brown v. Vawser*, 4 East, 585.

(b) *Whether an appraisement or an award.*

An appraisement stamp is proper for a valuation by referees, pursuant to an agreement. *Leeds v. Burrows*, 12 East, 1.

(c) *An instrument authorizing the execution of a deed.*

Semble, it need not be stamped as a deed. *Barrow v. Mashiter*, 4 East, 430.

III. OF INSTRUMENTS LIABLE OR NOT TO THE DUTY.

(a) *Agreements in general.*

Whether real or personal, they are liable. *Emmerson v. Heelis*, 2 Taunt. 438.

(b) *A schedule annexed.*

Must be stamped as a part of the instrument to which, &c. *Lake v. Ashwell*, 3 East, 326.

(c) *Agreement or memorandum.*

Any writing which would be an evidence, though only of part of the contract, must be stamped. *Ramsbottom v. Mortley*, 2 M. & S. 445. But a slip of paper, not signed nor required to be signed by either party, handed by an auctioneer to the vendee, describing the premises, term, and rent, on a lease of premises by auction, need not be stamped. *Ramsbottom v. Tunbridge*, 2 M. & S. 434.

(d) *Agreements under 20 l.*

1. An agreement to confess judgment for a sum exceeding 20 l., to secure a sum under that amount, and costs, is such. *Ames v. Hill*, 2 B. & P. 150.

2. Where an article is sold by auction in separate lots to the same purchaser, if each lot separately is under 20 l. value, no stamp is requisite. *Emmerson v. Heelis*, 2 Taunt. 38.

(e) *Contracts relating to the sale of goods.*

(e 1) *What are such.*

An agreement by a broker to indemnify his principal, on the re-sale of goods purchased by him. *Curry v. Edensor*, 3 T. R. 524.—2. A guarantee for the purchase of goods.—3. An agreement to share in goods purchased by the other party on their joint account. *Venning v. Leckie*, 13 East, 7.—4. An agreement to sell oil to be made from raw material. *Wilks v. Atkinson*, 1 Mars. 412; 6 Taunt. 11.

(e 2) *What are not such.*

Where the subject does not exist in the state of goods. *Waddington v. Bristow*, 2 B. & P. 451.—2. An agreement for the making of goods. *Buxton v. Bedall*, 3 East, 303.

(f) *Letters between merchants.*

A letter written by one who manages another's trade, binding himself to pay a debt contracted therein, is such. *M'Kenzie v. Banks*, 5 T. R. 176.

(g) *Drafts.*

1. The day on which a draft is delivered, is the day of issuing it, though it is not to be used till afterwards. *Allen v. Keever*, 1 East, 435.

2. The words "acting as bankers," are to be taken in their popular sense. *Castleman v. Ray*, 2 B. & P. 383.

(h) *Appointment of an umpire.*

Need not be stamped. *Routledge v. Thornton*, 4 Taunt. 704.

(i) *Bill of lading.*

The transit from Scotch to English ports is not an exportation. *Scotland v. Wilson*, 1 Mars. 204; 5 Taunt. 533.

(k) *Lease.*

As well simple leases as those under seal, must be stamped. *Doe, d. Estwick, v. Way*, 1 T. R. 735.

(l) *Assignment of a lease.*

When not under seal, did not formerly require a stamp. *Hodges v. Drakeford*, 1 N. R. 270.

(m) *Apprentice deed by a charity.*

A placing out by trustees, who, though parties to the deed do not execute it, is exempt from the duty. *Rex v. Quainton*, 2 M. & S. 338.

(n) *Cognovit.*

If without terms of agreement, need not be stamped. *Ames v. Hill*, 2 B. & P. 150; *Reardon v. Swaby*, 4 East, 188.

(o) *Law proceedings.*(o 1) *Declaration filed, and copy delivered in the Exchequer.*

Must be stamped. *Smith v. Bulkeley*, 2 Price, 114.

(o 2) *Copy of a judgment reversing a decree.*

Need not be stamped. *Jones v. Randall*, Cowp. 17.

(p) *Note for a prisoner's allowance, under the Lords' Act.*

Need not be stamped. *Tekell v. Casey*, 7 T. R. 670; over-ruling *Pitman v. Haynes*, Id. 530; *Bowring v. Edgar*, 1 B. & P. 270, accord.

(q) *A commission of bankruptcy.*

Need not be stamped. *Rex v. Bullock*, 1 Taunt. 71.

(r) *Legacies.*

1. Devise for life of the rents of realty and dividends of personality. Neither payment is liable to the duty. *Green v. Croft*, 2 H. B. 30.

2. A deed of settlement of leasehold and personality, retained by the party during his life, and confirmed in most respects by his will, will be considered a testamentary instrument, and the dispositions therein be liable to duty. *Attorney General v. Jones*, 3 Price, 368.

3. Legacies devised by one in India, but paid here, under a will proved here, are liable to the duty. *Attorney General v. Cockerell*, 1 Price, 165.

4. A bequest of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his property, in discharge of his pecuniary legacies, is liable to the duty, though the residuary legatee took the property *in statu quo*. *Attorney General v. Holford*, 1 Price, 426.

(s) *Bills and notes drawn abroad in blank.*

A bill drawn, signed and indorsed abroad, with blanks for the date, drawee, &c., and filled up here by one for whose use it was transmitted, does not require an English stamp. *Snaith v. Mingay*, 1 M. & S. 87. See *Crutchley v. Mann*, 1 Mars. 29; 5 Taunt. 529.

(t) *Agreement in England to accept a bill drawn abroad.*

Must be stamped. *Crutchley v. Mann*, 1 Mars. 29; 5 Taunt. 529.

IV. OF THE ADMISSIBILITY IN EVIDENCE OF UNSTAMPED INSTRUMENTS.

(a) *General rule.*

A writing is inadmissible, where, by admitting it, effect is given to an unstamped instrument. *Castleman v. Ray*, 2 B. & P. 383.

(b) *On notice, or refusal to produce the part stamped.*

Where an instrument consists of two parts, the one stamped, the other not, secondary evidence of its contents may be given by the party in possession of the unstamped part, on his adversary's refusal, after notice, to produce the other. *Garnons v. Swift*, 1 Taunt. 507.

(c) *Made abroad.*

Cannot be admitted, if inadmissible abroad. *Alves v. Hodgson*, 7 T. R. 241.

(d) *For collateral purposes.*

(d 1) *What are such.*

1. The refreshment of a witness's memory. *Jacob v. Lindsay*, 1 East, 460.

2. The proof of an agreement expired; under the terms of which the parties impliedly continue. *Rex v. Pendleton*, 15 East, 449.

3. The proof that a letter, containing the unstamped instrument, was stolen. *Rex v. Pooley*, 3 B. & P. 311.

(d 2) *What are not such.*

1. Proof, in an indictment for setting fire to a house, with intent to defraud the insurers, of an indorsement on the policy, allowing their removal to that house. *Rex v. Gillson*, 1 Taunt. 95.

2. A lease adduced to prove that fixtures are to be paid for, must, in an action for their value, be stamped. *Corder v. Drakeford*, 3 Taunt. 382.

V. ON THE ADMISSIBILITY OF PAROL EVIDENCE IN LIEU OF UNSTAMPED INSTRUMENTS.

(a) *General rule.*

Is inadmissible where the instrument is the only legal proof of the fact. *Rex v. St. Paul's Bedford*, 6 T. R. 458; *Hodges v. Drakeford*, 1 N. R. 271.

(b) *In lieu of a bill or note.*

If a bill or note given in payment cannot be stamped, the creditor may sue on the original demand. *Alves v. Hodgson*, 7 T. R. 241; *Tyte v. Jones*, 1 East, 58, n. *Brown v. Watts*, 1 Taunt. 353.

VI. ON THE RE-STAMPING OF WRITTEN INSTRUMENTS AFTER ALTERATION.

(a) *In furtherance of the original intention.*

A mistake may be rectified by consent, without re-stamping.—The instrument in this case was a deed, which was delivered *de novo*. *Cole v. Parkin*, 12 East, 471.

(b) *In the case of a policy.*

(b 1) *When necessary.*

Where the alteration is in the subject matter. *Hubbard v. Jackson*, 4 Taunt. 169. Thus, from ship and outfit (in voyages upon the southern whale fishery)

to ship and goods. *Hill v. Patten*, 8 East, 373.

(b 2) *When unnecessary.*

In the cases of,—1. The correction of a mistake in the name of the ship, written by an agent in the margin. *Robinson v. Touray*, 1 M. & S. 217.—2. Extension of the time of sailing. *Kensington v. Inglis*, 8 East, 273.—3. Cancelling a warranty to sail on such a day. *Hubbard v. Jackson*, 4 Taunt. 169.—4. The alteration in the interest declared from "ship," to "goods as interest may appear," the assured having no interest in the ship. *Sawtell v. Loudon*, 1 Mars. 99; 5 Taunt. 359.—5. Cancelling marks on goods whose import is unknown. *Hubbard v. Jackson*, 4 Taunt. 169.

VII. OF THE DUTY PAYABLE.

(a) *On leases.*

The reservation of rent, is not an essential to exempt leases for fines from the *ad valorem* duty. *Roe, d. Larkin, v. Chenhalls*, 4 M. & S. 23.

(b) *On policies.*

Where the distinct interests of several are insured, under one entire sum, "to be thereafter declared and valued," the stamp must cover the fractional parts of 100 *l.* in each interest. *Rapp v. Allnutt*, 15 East, 601.

(c) *On bonds.*

1. A bond for the payment of rent, is liable to a similar duty with other bonds. *Attree v. Anscomb*, 2 M. & S. 88.

2. Bond for securing money already advanced, and to be advanced in account current, must, without reference to the penal sum, have a 20 *l.* stamp. *Scott v. Allsop*, 2 Price, 20.

(d) *On apprenticeship deeds.*

(d 1) *By what act imposed.*

The duties now payable, are under 48 Geo. III, c. 149. *Gye v. Felton*, 4 Taunt. 876. See the new Stamp Act.

(d 2) *In relation to a benefit,—what is not.*

1. Covenant by the father to clothe and maintain. *Rex v. Leighton*, 4 T. R. 732.

2. Stipulation by the apprentice to allow his master 2 *s.* per week, the master to allow him wages. *Rex v. Bradford*, 1 M. & S. 151.

3. By the apprentice, to supply himself with necessaries, the master to allow him a weekly sum, (unless such sum is shewn not to be an equivalent.) *Rex v. Walton in Le Dale*, 3 T. R. 515.

4. By the apprentice, to allow the master his earnings, or a part. *Rex v. Wantage*, 1 East, 601.

(e) *On a warrant of attorney.*

A warrant under seal, to confess judgment and release errors, is within the exemption in stat. 37 Geo. III, c. 111. *Barrow v. Mashiter*, 4 East, 431.

(f) *On law proceedings.*

Close copies may be used as evidence, without any additional to the common stamps. *Doc, d. Lucas, v. Fulford*, 1 Blk. 288.

(g) *On legacies.*

(g 1) *Specific.*

The case of a bequest within the meaning of the clause, in 48 Geo. III, c. 149, schedule 3, "not paid, retained, satisfied, or discharged, till after 10th Oct. 1808." *Attorney General v. Lady Louisa Manners*, 1 Price, 411.

(g 2) *Residuary.*

Is to be computed upon the aggregate amount of the residue of testator's property, as it stood when executor delivered into the stamp-office, the note of what he intends retaining as residuary legatee. *Attorney General v. Lord George Cavendish*, Wightw. 82.

VIII. ON THE FORM OF THE INSTRUMENT, WITH REFERENCE TO THE STAMP ACTS.

(a) *An apprenticeship deed.*

A larger sum than what was paid, may be stated as the fee. *Rex v. Keynsham*, 5 East, 309; *Rex v. Quainton*, 2 M. & S. 338.

IX. OF PENALTIES UNDER THE STAMP ACTS.

(a) *Under 1 Ann, sess. 2, c. 22.*

Are incurred, by erasing names and dates upon letters of attorney, made in England, to collect debts abroad. *Stonlake v. Babb*, 5 Burr. 2673.

STATUTE.

(b) *Of compounding actions for.*

(b 1) *Notice of motion to the Stamp-office, whether necessary.*

No; where the action is not supported by them. *Salisbury v. Hyde*, 2 Anst. 523.

(b 2) *Form of motion.*

Must specify the sum at which it is compounded. *Salisbury v. Hyde*, 2 Anst. 523.

X. RELATIVE TO THE FORGERY OF STAMPS.

(a) *What considered as.*

The form of the original fabrication is immaterial, if, when uttered, it was complete. *Rex v. Collicott*, 4 Taunt. 300.

(b) *Form of indictment for.*

No *fac simile*, or particular description of the stamp, is necessary. *Rex v. Collicott*, 4 Taunt. 300.

STATUTE.

I. OF STATUTES IN GENERAL.

(a) *Relation of, in point of time.*

(a 1) *To the first day of the sessions*, p. 929.

(a 2) *When passed, to supply an omission in a previous act*, p. 929.

(b) *On the individuality of.*

(b 1) *Statutes in pari materia*, p. 929.

(b 2) *Statutes relating to the same class of persons*, p. 929.

(c) *On the repeal of.*

(c 1) *By user and non-user*, p. 929.

(c 2) *By a recital in another statute*, p. 929.

(c 3) *Where it superadded penalties to a common law offence*, p. 929.

(d) *On the revival of.*

(d 1) *By the expiration of a temporary repealing statute*, p. 929.

(d 2) *Relation thereon, in point of time*, p. 930.

- (e) *Registration of, in a particular country.*
 - (e1) *Its operation in law,* p. 930.
- (f) *In relation to the crown.*
 - (f1) *Implied repeal of clauses limiting its rights,* p. 930.
 - (f2) *Whether the crown may controul,* p. 930.
- (g) *Transactions in violation of, whether void or voidable,* p. 930.
- (h) *Rules of construction.*
 - (h1) *Founded on the intention.*
 - (h2) *Individuality of a general and a special clause,* p. 930.
 - (h3) *Positive enactments, whether restrained by preamble,* p. 930.
 - (h4) *Construction of expressions in general,* p. 930.
 - (h5) *Construction of the expression, "an act to be passed,"* p. 930.
 - (h6) *Admissibility of usage, or evidence to explain,* p. 930.
- (i) *Whether conclusive of facts recited therein, as existing,* p. 930.
- (k) *Relative to remedies given by.*
 - (k1) *Whether in exclusion of, or cumulative to common law remedies,* p. 930.
- (l) *Relative to actions on.*
 - (l1) *Reference to the statute, whether essential,* p. 930.

II. OF PUBLIC STATUTES.

- (a) *Whether those relating to trade, are considered as,* p. 930.

III. OF PRIVATE STATUTES.

- (a) *Whether those passed on the petition of individuals, though declared public, are considered such,* p. 930.
- (b) *Rules of construction,* p. 931.
- (c) *Ex officio notice of,* p. 931.

IV. OF A CERTAIN PARTICULAR STATUTE,—THE GENERAL DEFENCE ACT.

- (a) *Proceedings thereon, in relation to compensation,* p. 931.

I. OF STATUTES IN GENERAL.

- (a) *Relation of, in point of time.*

- (a1) *To the first day of the sessions.*

Obtains even where the act is to take effect "from and after the passing of the act." *Latless v. Holmes*, 4 T. R. 660; *Hall v. Whalley*, Id. 662, n.

- (a2) *When passed to supply an omission in a previous act.*

Has relation to the time of the former, being of the same session. *Attorney General v. Pougett*, 2 Price, 381.

- (b) *On the individuality of.*

- (b1) *Statutes in pari materia.*

Are to be considered as one law, and construed together. *Rex v. Excise Commissioners*, 2 T. R. 387; *Rex v. Mason*, Id. 586; *Lofft*, 371; *Dougl.* 30; 4 M. & S. 210.

- (b2) *Statutes relating to the same class of persons.*

Are not, unless in *pari materia*, to be incorporated together. Hence, the venue in actions against toll-gate keepers acting quasi under st. 25 Geo. III, c. 51, is transitory. *Bazing v. Skelton*, 5 T. R. 16.

- (c) *On the repeal of.*

- (c1) *By user and non-user.*

Cannot be; though where the act is ambiguous they may go far to explain it. *White v. Boot*, 2 T. R. 274; *Leigh v. Kent*, 3 T. R. 364.

- (c2) *By a recital in another statute.*

Cannot be. *Dore v. Gray*, 2 T. R. 358.

- (c3) *Where it superadded penalties to a common-law offence.*

Does not repeal the common-law offence and punishment. *Rex v. Waddington*, 1 East, 143.

- (d) *On the revival of.*

- (d1) *By the expiration of a temporary repealing statute.*

Does not revive. *Warren v. Windle*, 3 East, 205.

(d 2) *Relation thereon, in point of time.*

A statute reviving a temporary act then expired, has a retrospective influence. *Shipman v. Henbest*, 4 T. R. 109.

(e) *Registration of, in a particular country.*(e 1) *Its operation in law.*

Is an immaterial circumstance to the statute's obligatory force. *Attorney General v. Le Merchant*, 2 T. R. 201, n.

(f) *In relation to the crown.*(f 1) *Implied repeal of clauses limiting its rights.*

Are repealed by subsequent statutes, unless expressly re-enacted. *Attorney General v. Newman*, 1 Price, 438.

(f 2) *Whether the crown may controul.*

No; thus not by its license. *Toulmin v. Anderson*, 1 Taunt. 227.

(g) *Transactions in violation of, whether void or voidable.*

1. Where a transaction is made void by statute, to protect one man from the designs of another, it is utterly void. But voidable only, where made to protect the rights of third persons. *Semble, Crosley v. Arkwright*, 2 T. R. 603.

2. A transaction contrary to a penal statute, is void. *Supra*, 255, (b 8)

(h) *Rules of construction.*(h 1) *Founded on the intention.*

The ends contemplated, are to be considered. *Curling v. Chalklen*, 3 M. & S. 510.

(h 2) *Individuality of a general and a special clause.*

Accord. *Andree v. Fletcher*, 2 T. R. 161.

(h 3) *Positive enactments,—whether restrained by preamble.*

No. *Jones v. Smart*, 1 T. R. 44; *Crespigny v. Wittlenoom*, 4 T. R. 790; *Rex v. Pierce*, 3 M. & S. 62; *Lofft*, 783.

(h 4) *Construction of expressions in general.*

If they have acquired a definite meaning in law, they must be so expounded. *Rex v. Bucks* (Justices of,) 2 M. & S. 230.

(h 5) *Construction of the expression "an act to be passed."*

Applies to an act passed in the same

session, though prior in point of time. *Nares v. Rowles*, 14 East, 510.

(h 6) *Admissibility of usage or evidence to explain.*

1. When ambiguous, usage may explain; *secus*, where not ambiguous. *Rex v. Hogg*, 1 T. R. 728; *Rex v. Scott*, 3 T. R. 602; *Rex v. Aire & Calder Navigation*, 2 T. R. 660; *Rex v. Miller*, 6 T. R. 268.

2. Evidence to explain the meaning of technical words, is inadmissible. *Attorney General v. Plate Glass Company*, 1 Anst. 39.

(i) *Whether conclusive of facts recited therein as existing.*

Yes; and the courts must notice their existence *ex officio*. *Rex v. De Berenger*, 3 M. & S. 67; *Briscoe v. Lord Egremont*, Id. 88; *Rex v. Sutton*, 4 M. & S. 532. Excepting that by mis-stating that a situation of things exists under a former statute, it does not create them. *Brazen-nose College, Oxford, v. Bishop of Salisbury*, 4 Taunt. 831.

(k) *Relative to remedies given by.*(k 1) *Whether in exclusion of or cumulative to, common law remedies.*

Are cumulative to, though of a different nature. *Rex v. Chamberlayne*, 1 T. R. 103; and see *Beckford v. Hood*, 7 T. R. 620.

(l) *Relative to actions on.*(l 1) *Reference to the statute,—whether essential.*

Yes. And in the case of an offence charged, *semble*, the reference must be by "*contra formam statuti*." *Lec v. Clarke*, 2 East, 333.

II. OF PUBLIC STATUTES.

(a) *Whether those relating to trade are considered as.*

Yes, if to trade in general. *Secus*, if to a particular trade. *Kirk v. Nowill*, 1 T. R. 118.

(b) *Of the virtual assent to.*

Is implied on the part of every one. *Hornby v. Houlditch*, 1 T. R. 93, n.

III. OF PRIVATE STATUTES.

(a) *Whether those passed on the petition of individuals, though declared public, are considered such.*

Yes, in point of construction. *Perchard v. Heywood*, 8 T. R. 468.

(b) *Rules of construction.*

They must be construed with reference to the intention of the parties concerned, as collected from the words used. *Townley v. Gibson*, 2 T. R. 705. And if for settling estates, they must be construed as common conveyances are. *Hornby v. Houlditch*, 1 T. R. 93, n. Loft. 416.

(c) *Ex officio notice of.*

Notice will be taken only of the part pleaded. *Kirk v. Nowill*, 1 T. R. 118.

IV. OF A CERTAIN PARTICULAR STATUTE,—THE GENERAL DEFENCE ACT.

(a) *Proceedings thereon, in relation to compensation.*

See *Bingham v. Serle*, 5 East, 534; 2 Smith, 129; *Ex parte Templer*, 2 Smith, 90.

STOCK, OR FUNDED PROPERTY.

I. NATURE AND PROPERTIES OF.

(a) *Whether considered as money*, p. 931.

II. OF THE ACTION FOR NOT ACCEPTING STOCK.

(a) *Preliminaries to.*

(a 1) *Tender*, p. 931.

(a 2) *Actual transfer of the stock to another, before action brought*, p. 931.

III. OF THE ACTION FOR NOT REPLACING STOCK.

(a) *Measure of damages in*, p. 931.

IV. OF THE STOCK-JOBGING ACT.

(a) *Whether penal or remedial*, p. 931.

(b) *What transactions are within*, p. 931.

(c) *What transactions are not within*, p. 931.

I. NATURE AND PROPERTIES OF.

(a) *Whether considered as money.*

No. Not therefore within the meaning of a contract to enable A. to recover money. *Jones v. Brinley*, 1 East, 1.

II. OF THE ACTION FOR NOT ACCEPTING STOCK.

(a) *Preliminaries to.*

(a 1) *Tender.*

After an actual tender and refusal, the sale to a third person may be *instantly* on the same day. *Dorriens v. Hutchinson*, 1 Smith, 420.

(a 2) *Actual transfer of the stock to another, before action brought.*

Is essential to its maintenance. *Heckscher v. Gregory*, 4 East, 607; 1 Smith, 293.

III. OF THE ACTION FOR NOT REPLACING STOCK.

(a) *Measure of damages in.*

1. Is the price the stock bears at the time of trial, if exceeding what it bore at the appointed day. If less, then the latter price. *Shepherd v. Johnson*, 2 East, 211; *Payne v. Burke*, Id. 213, n.

2. But special damages for the loss of a profit which plaintiff *might*, but which it appears he *would not* have made, are not recoverable. *M'Arthur v. Lord Seaforth*, 2 Taunt. 257.

IV. OF THE STOCK-JOBGING ACT.

(a) *Whether penal or remedial.*

Is rather remedial. *Billing v. Flight*, 2 Mars. 124; 6 Taunt. 419.

(b) *What transactions are within.*

Jobbing in omnium. *Brown v. Turner*, 7 T. R. 630.

(c) *What transactions are not within.*

1. Sale by a broker of stock possessed by his principal, without disclosing his principal's name. *Child v. Morley*, 8 T. R. 610.

2. Contract on a loan raised by the sale of stock, to transfer an equal quantity, though party is not possessed of it. *Sanders v. Kentish*, 8 T. R. 162.

STRANGER.

PLEADINGS BY, TO A DEED.

In denial, even of an indenture, are *ne lessa ne dona*, and the like. *Taylor v. Needham*, 2 Taunt. 278.

STRATFORD-UPON-AVON, CORPORATION OF.

WHETHER BY PRESCRIPTION.

Yes. *Rex v. Same*, 14 East, 348.

SUNDAY. (See TIME.)

I. RELATIVE TO CONTRACTS CONCLUDED ON.

(a) *Whether valid*, p. 932.

II. RELATIVE TO THE EXERCISE OF ONE'S ORDINARY CALLING ON.

(a) *What not considered as*, p. 932.

(b) *Measure of penalties thereby incurred*, p. 932.

III. PROCEEDINGS IN CAUSES CONSIDERED IN RELATION TO.

(a) *Execution of process on.*

(a 1) *Arrest, after a discharge through mistake*, p. 932.

(a 2) *Arrest of the principal by bail to the sheriff*, p. 932.

(a 3) *Attachment for not performing an award*, p. 932.

(a 4) *Capias on a conviction for non-payment of penalty*, p. 932.

(a 5) *Waiver of irregularities by*, p. 932.

(b) *Service of notices on.*

(b 1) *Whether allowable*, p. 932.

(b 2) *Waiver of irregularities by*, p. 932.

(c) *Service of rules on*, p. 932.

(c 1) *Nisi for an attachment for non-payment under the master's allocatur*, p. 932.

I. RELATIVE TO CONTRACTS CONCLUDED ON.

(a) *Whether valid.*

Yes; unless made in the exercise of one's calling. *Drury v. Defontaine*, 1 Taunt. 131.

II. RELATIVE TO THE EXERCISE OF ONE'S ORDINARY CALLING ON.

(a) *What not considered as.*

Baking dinners for customers. *Rex v. Younger*, 5 T. R. 449.

(b) *Measure of penalties thereby incurred.*

One only in the compass of a day. *Crepps v. Durden*, Cowp. 640.

III. PROCEEDINGS IN CAUSES CONSIDERED IN RELATION TO.

(a) *Execution of process on.*

(a 1) *Arrest, after a discharge, through mistake.*

Where the mistake results from ignorance of a detainer previously lodged, the re-taking by the sheriff cannot be on a Sunday. *Atkinson v. Jameson*, 5 T. R. 25.

(a 2) *Arrest of the principal by bail to the sheriff.*

Cannot be. *Brooks v. Warren*, 2 Blk. 1273.

(a 3) *Attachment for not performing an award.*

Cannot be executed. *Rex v. Myers*, 1 T. R. 266.

(a 4) *Capias on a conviction for non-payment of penalty.*

Cannot be executed. *Rex v. Myers*, 1 T. R. 265.

(a 5) *Waiver of irregularities by.*

Cannot be waived by the adverse party. *Taylor v. Phillips*, 3 East, 155.

(b) *Service of notices on.*

(b 1) *Whether allowable.*

Not as to those on which rules are made,—thus, notice of plea filed. *Roberts v. Monkouse*, 8 East, 547. Nor can service of notice of declaration be on the preceding Saturday, where the essoign falls on Sunday. *Moffat v. Carter*, 2 N. R. 75.

(b 2) *Waiver of irregularities by.*

Cannot be waived by the adverse party. *Morgan v. Johnson*, 1 H. B. 628.

(c) *Service of rules on.*

(c 1) *Nisi for an attachment for non-payment under the master's allocatur.*

Cannot be. *M^r Ileham v. Smith*, 8 T. R. 86.

SUPERSEDEAS, OF PRISONERS.

Rules and orders for, must in C. B. be filed with prothonotaries, upon their sign-

SURGEON.

ing the writ. C. B. East, 57 Geo. III; 7 Taunt. 551.

SURGEON.

RESPONSIBILITY OF.

- (a) *For want of skill*, p. 933.
- (b) *For the consequences of a novel experiment*, p. 933.

RESPONSIBILITY OF.

- (a) *For want of skill*.

He is liable for the consequences of. *Scare v. Prentice*, 8 East, 348.

- (b) *For the consequences of a novel experiment*.

He is liable, if contrary to the usual practice. *Slater v. Baker*, 2 Wils. 359.

TAIL, ESTATE IN.

I. RELATIVE TO THE DISCONTINUANCE OF.

- (a) *Actual seisin by force of the entail,—whether essential to*, p. 933.
- (b) *Whether effected by a secret feoffment under a naked possession*, p. 933.

II. RELATIVE TO RECOVERIES SUFFERED OF.

- (a) *Actual seisin,—whether essential to*, p. 933.
- (b) *Nature of the estate thereby created*, p. 933.
- (c) *What estates granted by or to the crown, are protected from*, under stat. 34 Hen. VIII, c. 20, p. 933.

III. RELATIVE TO FINES LEVIED OF.

- (a) *Nature of the estate thereby created, where the tenant in tail has the reversion in fee*, p. 933.
- (b) *By a felon,—before conviction*, p. 934.

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IV. RELATIVE TO INNOCENT CONVEYANCES OF.

- (a) *Nature of the estate thereby created*, p. 934.

V. RELATIVE TO LEASES BY TENANT IN TAIL.

- (a) *Whether void for the excess only, when for more than 21 years*, p. 934.
- (b) *Whether good against the reversioner, where other lands are mixed with those entailed*, p. 934.

I. RELATIVE TO THE DISCONTINUANCE OF.

- (a) *Actual seisin by force of the entail,—whether essential to*.
Yes. *Driver, d. Burton, v. Hussey*, 1 H. B. 269.
- (b) *Whether effected by a secret feoffment under a naked possession*.
No. *Doe, d. Atkyns, v. Horde, Cowp.* 689.

II. RELATIVE TO RECOVERIES SUFFERED OF.

- (a) *Actual seisin,—whether essential to*.
Yes. So that if by remainder-man, surrender of life estate must appear. *Goodtitle, d. Bridges, v. Duke of Chandos*, 2 Burr. 1065.
- (b) *Nature of the estate thereby created*.
Tenant in tail takes the fee, either by purchase or descent, as he took the estate tail. *Roe, d. Crow, v. Baldwin*, 5 T. R. 104; *Martin, d. Tregonwell, v. Strachan*, Id. 107, n.
- (c) *What estates granted by or to the crown are protected from*, under stat. 34 Hen. VIII, c. 20.
Those only which are clearly of the gift or provision of the king. *Perkins, d. Voue, v. Sewell*, 1 Blk. 654; 4 Burr. 2223.

III. RELATIVE TO FINES LEVIED OF.

- (a) *Nature of the estate thereby created, where the tenant in tail has the reversion in fee*.
A base fee is created, which merges in the other fee, and so lets in the ancestor's

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incumbrances. *Roe, d. Crow, v. Baldwere*, 5 T. R. 104.

(b) *By a felon before conviction.*

Semble, is operative. *Stevens, d. Costard, v. Winning*, 2 Wils. 219.

IV. RELATIVE TO INNOCENT CONVEYANCES OF.

(a) *Nature of the estate thereby created.*

The grantee has a base fee, determinable on the death of tenant in tail. *Goodright, d. Tyrrel, v. Mead*, 3 Burr. 1703; *Doe, d. Neville, v. Rivers*, 7 T. R. 276.

V. RELATIVE TO LEASES BY TENANT IN TAIL.

(a) *Whether void for the excess only, when for more than 21 years.*

Yes. *Hardcastle v. Shafto*, 1 Anst. 77.

(b) *Whether good against the reversioner, where other lands are mixed with those entailed.*

Not if the rent reserved is entire. *Rees, d. Perkins, v. Philip, Wightw.* 69.

TAXES.

I. ON THE RATEABILITY OF PROPERTY.

(a) *Leased to the military*, p. 934.

II. OF EXEMPTIONS FROM.

(a) *Of lands in London embanked under 7 Geo. III, c. 37.*

(a 1) *Whether from the land tax*, p. 934.

(a 2) *Whether from house and window tax*, p. 934.

III. OF LEVYING THE ARREARS OF.

(a) *Preliminary assessments, (in a particular instance)* p. 934.

(b) *Distress for.*

(b 1) *Of including separate and distinct arrears in the same warrant*, p. 934.

(b 2) *Whose property may be taken under (for the house and window tax)* p. 935.

IV. ON THE JURISDICTION OVER QUESTIONS RELATIVE TO.

(a) *Whether decided on motion*, p. 935.

TAXES.

(b) *Appeal from.*

(b 1) *Limitation of, in the case of surcharging the duties on servants, &c.* p. 935.

V. OF COVENANTS TO PAY TAXES.

(a) *Implied exception therein*, p. 935.

VI. RELATIVE TO TAX COLLECTORS.

(a) *Appointment of.*

(a 1) *In general*, p. 935.

(a 2) *In relation to penalties*, p. 935.

(b) *Penalties under 43 Geo. III, c. 99, s. 12, how incurred by*, p. 935.

(c) *Bond of, its extent as a security*, p. 935.

(d) *Re-assessment on default of.*

(d 1) *On whom imposed*, p. 935.

(d 2) *Extent of*, p. 935.

(e) *Discharge of, from custody, under an extent, on a re-assessment, on default of, realized*, p. 935.

I. ON THE RATEABILITY OF PROPERTY.

(a) *Leased to the military.*

Under stat. 10 Geo. III, c. 23, s. 93, 105, the owner of stables in Mary-le-bone, rented for the use of the military, is rateable. *Eckersall v. Briggs*, 4 T. R. 6.

II. OF EXEMPTIONS FROM.

(a) *Of lands in London, embanked under 7 Geo. III, c. 37.*

(a 1) *Whether from the land-tax.*

Yes. *Williams v. Pritchard*, 4 T. R. 2.

(a 2) *Whether from house and window tax.* No. *Perchard v. Heywood*, 8 T. R. 468.

III. OF LEVYING THE ARREARS OF.

(a) *Preliminary assessment (in a particular instance.)*

Is necessary to levy for years passed, where the power is to assess yearly. *Newton v. Young*, 1 N. R. 187.

(b) *Distress for.*

(b 1) *Of including separate and distinct arrears in the same warrant.*

May be done. *Patchett v. Bancroft*, 7 T. R. 367.

TAXES.

- (b 2) *Whose property may be taken under, (for the house and window tax.)*

Any persons found upon the premises chargeable, though there is other sufficient belonging to the defaulter. *Inson v. Dixon*, 1 M. & S. 601.

IV. ON THE JURISDICTION OVER QUESTIONS RELATIVE TO.

- (a) *Whether decided on motion.*

Not in relation to the assessed taxes. *Res v. Navy Commissioners*, 3 Anst. 858.

- (b) *Appeal from.*

- (b 1) *Limitation of, in the case of surcharging the duties on servants, &c.*

Is confined to the time prescribed by the commissioners, under 25 Geo. III, c. 43. *Res v. Walker*, 6 T. R. 433.

V. OF COVENANTS TO PAY TAXES.

- (a) *Implied exception therein.*

Is implied of taxes which the party cannot lawfully defray. *Gaskell v. King*, 11 East, 165.

VI. RELATIVE TO TAX COLLECTORS.

- (a) *Appointment of.*

- (a 1) *In general.*

The insertion of a name as such, in the commissioner's warrants, is not sufficient. *Res v. Radley*, Forrester 150.

- (a 2) *In relation to penalties.*

Acting under the acknowledged appointment of commissioners, though the assessment under which they were to act is not signed, is sufficient to incur penalties. *Res v. Dobson*, 3 Smith, 213; 7 East, 218.

- (b) *Penalties under 43 Geo. III, c. 99, s. 12, how incurred by.*

Not by enacting a duty not charged in the assessment. *Lister v. Priestley*, Wightw. 405.

- (c) *Bond of, its extent as a security.*

Covers the expenses of process and execution against him. *Res v. Deane*, 3 Anst. 369.

- (d) *Re-assessment on default of.*

- (d 1) *On whom imposed.*

Where two collectors are appointed to each hamlet of a constablewick, the re-assessment under stat. 20 Geo. II, c. 3, must be confined to that hamlet to which

TENDER.

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the defaulters were nominated. *Barrs v. Digby*, 1 N. R. 281.

- (d 2) *Extent of.*

The pariah is liable for every kind of assessed tax. *Res v. St. George's*, 3 Anst. 920; *Res v. Wimbledon*, 3 Anst. 855.

- (e) *Discharge of, from custody, under an extent on a re-assessment, on default of, realized.*

Is not entitled to. *Res v. Bennett*, Wightw. 1.

TENDER.

I. WHEN ALLOWABLE.

- (a) *Whether in discharge of a bare covenant to pay money, p.* 936.

II. ESSENTIALS TO ITS VALIDITY.

- (a) *Actual production of the money, p.* 936.

- (b) *Tender of a larger sum, p.* 936.

III. OF BANK NOTES.

- (a) *Whether made a legal tender by stat. 37 Geo. III, c. 45, p.* 936.

IV. BY AN AGENT, p.

V. TO AN AGENT,—A MANAGING CLERK, p.

VI. TO ONE OF TWO JOINT CREDITORS, p.

VII. WHETHER BARRED BY STEPS TAKEN TOWARDS COMMENCING AN ACTION, p.

VIII. SINCE THE COMMENCEMENT OF THE SUIT, AND BEFORE DECLARATION.

- (a) *Its legal effect, p.* 936.

IX. TENDER AND REFUSAL, WHETHER EQUIVALENT TO PAYMENT, p.

X. PLEA OF.

- (a) *Its form in assumpsit, p.* 936.

- (b) *When pleaded to the whole declaration, whether may afterwards be limited, p.* 936.

- (c) *Of taking out the money on denial of plea, p.* 936.

(d) *What facts are admitted thereby*, p. 936.

(e) *Joinder of another plea therewith*, p. 936.

I. WHEN ALLOWABLE.

(a) *Whether in discharge of a bare covenant to pay money.*

Yes. *Johnson v. Clay*, 7 Taunt. 486.

II. ESSENTIALS TO ITS VALIDITY.

(a) *Actual production of the money.*

Is requisite, unless dispensed with by the creditor. *Douglas v. Patrick*, 3 T. R. 683; *Thomas v. Evans*, 10 East, 101.

(b) *Tender of a larger sum.*

Is good. *Douglas v. Patrick*, 3 T. R. 683; if divisible without giving change. *Robinson v. Cooke*, 6 Taunt. 336.

III. OF BANK NOTES.

(a) *Whether made a legal tender by stat.*
37 Geo. III, c. 45.

No. *Grigby v. Oakes*, 2 B. & P. 526.

IV. BY AN AGENT.

Enures for the principal, though authorized only to tender a less sum. *Read v. Goldring*, 2 M. & S. 86.

V. TO AN AGENT,—A MANAGING CLERK.

Is good, though ordered by principal not to accept it. *Muffatt v. Parsons*, 1 Mara. 55; 5 Taunt. 307.

VI. TO ONE OF TWO JOINT CREDITORS.

Is a tender to both. *Douglas v. Patrick*, 3 T. R. 683.

VII. WHETHER BARRED BY STEPS TAKEN TOWARDS COMMENCING AN ACTION.

No. *Briggs v. Calverly*, 8 T. R. 629.

VIII. SINCE THE COMMENCEMENT OF THE SUIT, AND BEFORE DECLARATION.

(a) *Its legal effect.*

In C. B. the plaintiff is bound, at the risk of subsequent costs, to accept the debt and costs up to the time of tender. *Zeevin v. Cowell*, 2 Taunt. 203; if the offer amounts to a legal tender. *Gibbon*

v. Copeman, 1 Mara. 392; 5 Taunt. 840. Though he goes for other causes. *Roberts v. Lambert*, 2 Taunt. 283. *Secus*, in *K. B. Burmester v. Hilch*, 13 East, 551.

IX. TENDER AND REFUSAL, WHETHER EQUIVALENT TO PAYMENT.

No. *Heathcote v. Crookshanks*, 2 T. R. 27.

X. PLEA OF.

(a) *Its form in assumpsit.*

Must aver a continual readiness to pay, from the time the debt accrued. *Hume v. Peploe*, 8 East, 168.

(b) *When pleaded to the whole declaration, whether may afterwards be limited.*

No. *Cox v. Brain*, 3 Taunt. 95.

(c) *Of taking out the money on denial of plea.*

The plaintiff may do so. *Le Grew v. Cooke*, 1 B. & P. 332.

(d) *What facts are admitted thereby.*

All but the amount of the damages. *Cox v. Brain*, 3 Taunt. 95.

(e) *Joinder of another plea therewith.*

See *supra* 729 (c 4), (c 6), and add to (c 4). *Maclean v. Howard*, 4 T. R. 194.

THAMES.

I. WATER BAILIFF OF.

(a) *His right to seize engines or fish in one's own fishery, as prohibited by stat.* 1 Eliz. c. 17, p. 936.

II. STATUTES RELATIVE TO 2 GEO. II, c. 26, s. 4.

(a) *Rowing for hire and gain, what is not*, p. 937.

I. WATER BAILIFF OF.

(a) *His right to seize engines or fish in one's own fishery, as prohibited by stat.* 1 Eliz. c. 17.

Must be founded on a previous presentment or conviction. *Bulbrook v. Goodere*, 3 Burr. 1768; 1 Blk. 569.

II. STATUTE RELATIVE TO 2 GEO. II, c. 26, s. 4.

(a) *Rowing for hire and gain, what is not.*

The rowing and towing up spars by a servant for his master, for which he receives nothing extra. *Rex v. Hobson*, 2 M. & S. 145; *Rex v. Taylor*, 2 M. & S. 147, n.

THEATRE.

I. CONTRACTS BY PERFORMERS AT.

(a) *Construction of*, p. 937.

II. ENTERTAINMENTS OF, WITHIN STAT. 10 GEO. II, c. 28.

(a) *What are or are not*, p. 937.

I. CONTRACTS BY PERFORMERS AT.

(a) *Construction of*.

A contract by A. with B. to dance, 1. "At an unlicensed theatre, by name:— 2. or at such other place as B. should appoint," is void as to the first part; and as to the second, obliges B. to request, not A. to tender, his services. *Gallini v. Laborie*, 5 T. R. 242.

II. ENTERTAINMENTS OF, WITHIN STAT. 10 GEO. II, c. 28.

(a) *What are or are not*.

1. Dancing is. *Gallini v. Laborie*, 5 T. R. 242.—2. Tumbling is not. *Rex v. Handy*, 6 T. R. 286.

TIME.

I. MONTH.

(a) *Mode of computing*.

(a 1) *In contracts*, p. 937.

(a 2) *In statutes*, p. 937.

(a 3) *In legal proceedings,—
a month's time to plead*,
p. 937.

II. DAY.

(a) *Mode of computing in legal proceedings*, p. 937.

(b) *Whether reckoned inclusively or exclusively*, p. 937.

(c) *Whether divisible*, p. 937.

(d) *Sittings after term, whether reckoned as one day*, p. 938.

III. REASONABLE TIME.

(a) *Whether in its nature a definite period*, p. 938.

(b) *When allowable by implication under a statute*, p. 938.

IV. IN RELATION TO PLEADING.

(a) *Of averring a temporal limit*, p. 938.

(b) *Of repugnancy in date*.

(b 1) *How objected to*, 938.

(b 2) *Whether cured by a substantive averment*, p. 938.

(c) *See PLEADING*, 741 (f 2);—
742 (b 5).

I. MONTH.

(a) *Mode of computing*.

(a 1) *In contracts*.

Depends upon the intention. *Lang v. Gale*, 1 M. & S. 111.

(a 2) *In statutes*.

Is by lunar months, unless a contrary sense is expressed or implied. *Lacon v. Hooper*, 6 T. R. 224.

(a 3) *In legal proceedings,—a month's time to plea*.

Is a lunar month. *Tullet v. Linfield*, 3 Burr. 1455; 1 Blk. 450; Dougl. 463.

II. DAY.

(a) *Mode of computing in legal proceedings*.

Is by law-days on motions in arrest of judgment. *Secus*, on pleas in abatement, in which, therefore, an intervening Sunday counts. *Lee v. Carlton*, 3 T. R. 642.

(b) *Whether reckoned inclusively or exclusively*.

The word "from," or "after," may mean either, *Pugh v. Duke of Leeds*, Cowp. 714; Loft. 276; but *prima facie* is inclusive. *Rex v. Adderley*, Dougl. 463.

(c) *Whether divisible*.

Is so to avoid injustice. *Pugh v. Robinson*, 1 T. R. 116.

- (d) *Sittings after term, whether reckoned as one day.*

Yes. *Pope v. Foster*, 4 T. R. 590.

III. REASONABLE TIME.

- (a) *Whether in its nature a definite period.*
Yes. *Palmer v. Maxon*, 2 M. & S. 50.

- (b) *When allowable by implication under a statute.*

Is implied, where no time is specified for performance of an act enjoined. *Palmer v. Maxon*, 2 M. & S. 43.

IV. IN RELATION TO PLEADING.

- (a) *Of averring a temporal limit.*

Where the time of an act is material, it should appear to have happened within the limit. *Rex v. Stevens*, 5 East, 244; 1 Smith, 437.

- (b) *Of repugnancy in date.*

- (b 1) *How objected to.*

By special demurrer only, when laid under a *videlicet* and *postea*. *Fenton v. Goundry*, 12 East, 459.

- (b 2) *Whether cured by a substantive averment.*

A repugnant date subjoined to the averment that the cause accrued before action commenced, is no ground for error. *Lee v. Clarke*, 2 East, 333.

TITHE.

I. OF LANDS EXEMPT FROM.

- (a) *Barren land,—what is*, p. 939.
(b) *An inclosure of common appurtenant*, p. 939.
(c) *Presumption against, from uninterrupted enjoyment*, p. 939.

II. OF TIMBER EXEMPT FROM. (See TREES.)

- (a) *What considered as or not*, p. 939.

III. OF PREDIAL ARTICLES EXEMPT FROM.

- (a) *Presumption is against*, p. 939.

IV. OF THE TITLE TO.

- (a) *Presumptive proof of*, p. 939.

TITHE.

V. GRANT OF.

- (a) *Whether grantable by specialty only*, p. 939.
(b) *Construction of*, p. 939.

VI. EJECTMENT FOR, ON A HOLDING OVER.

- (a) *Evidence in*, p. 939.

VII. MODUS IN LIEU OF.

- (a) *Essentials to the validity of a money modus*, p. 939.
(b) *Rankness of, how determined*, p. 939.

VIII. COMPOSITION FOR.

- (a) *Determination of.*
(a 1) *By notice*, p. 939.
(a 2) *By death of the incumbent*, p. 940.
(b) *Proportionable rights of the late and now incumbent*, p. 940.
(c) *Whether an admission by the occupier of the proprietor's title*, p. 940.
(d) *Relative to real compositions.*
(d 1) *Evidence in support of*, p. 940.

IX. RELATIVE TO THE MODE OF TITHING.

- (a) *At common law.*
(a 1) *General rules*, p. 940.
(a 2) *Of wheat*, p. 940.
(a 3) *Of grass*, p. 940.
(a 4) *Of hay*, p. 940.
(a 5) *Of hops*, p. 940.
(b) *By custom.*
(b 1) *Of wheat*, p. 940.
(b 2) *Of barley*, p. 940.
(b 3) *Of hops*, p. 940.

X. RELATIVE TO THE TITHE OWNER.

- (a) *Whether entitled to use an extra occupation way*, p. 940.

XI. OF THE ACTION FOR TREBLE VALUE.

- (a) *Whether an appropriate form for deciding the title to tithes*, p. 940.
(b) *Of the parties to*, p. 940.
(c) *Of the defence in.*
(c 1) *A modus*, p. 940.

(c 2) *Proof of non-payment of tithes within living memory*, p. 940.

(c 3) *Evidence in support of,—a custom in a neighbouring parish*, p. 940.

(d) *Evidence of title in*, p. 941.

(e) *Costs in, for plaintiff*, p. 941.

(f) *New trial in*, p. 941.

XII. OF THE REMEDY FOR NOT REMOVING.

(a) *General rule*, p. 941.

(b) *Action for*.

(b 1) *Preliminary notice*, p. 941.

I. OF LANDS EXEMPT FROM.

(a) *Barren land,—what is*.

That which requires an unusual expense in manuring and tillage. *Warwick v. Collins*, 2 M. & S. 349.

(b) *An inclosure of common appurtenant*.

Is not exempt from specific tithes from which the land, to which it was appurtenant, is. *Moncaster v. Watson*, 3 Burr. 1375; 1 Blk. 402.

(c) *Presumption against, from uninterrupted enjoyment*.

Held to arise, notwithstanding endowment in 1253. *Lady Dartmouth v. Roberts*, 16 East, 334.

II. OF TIMBER EXEMPT FROM.

(a) *What considered as or not*.

1. Does not depend upon the girth of the wood. *Ford v. Racster*, 4 M. & S. 135.—2. Oak germins growing from old stools, the stumps of trees, which had each stood respectively above twenty years, are not. *Ibid*; *Lewis v. Snell*, 4 M. & S. 131.

III. OF FRÆDIAL ARTICLES EXEMPT FROM.

(a) *Presumption is against*.

Hallowell v. Trappes, 2 N. R. 173.

IV. OF THE TITLE TO.

(a) *Presumptive proof of*.

Perception, even by the rector of another parish, is so, against one not claiming them. *Barnes v. Messenger*, 13 East, 261.

V. GRANT OF.

(a) *Whether grantable by specialty only*.

Yea. *Chave v. Calmel*, 3 Burr. 1873.

(b) *Construction of*.

The words "all tithes arising out of, or in respect of, farms, lands," &c. are sufficient to pass the tithes of appurtenants. *Lord Gwydir v. Foakes*, 7 T. R. 641.

VI. EJECTMENT FOR, ON A HOLDING OVER.

(a) *Evidence in*.

An intention not to quit possession, must be shewn. *Doe, d. Brierley, v. Palmer*, 16 East, 53.

VII. MODUS IN LIEU OF.

(a) *Essentials to the validity of a money modus*.

A fixed day at, or time about, which it is payable. *Roberts v. Williams*, 12 East, 33.

(b) *Rankness of, how determined*.

By the jury. *Pryke v. Dowling*, 2 Blk. 1257.

VIII. COMPOSITION FOR.

(a) *Determination of*.

(a 1) *By notice*.

1. Is requisite, *Loft*, 66; and *semble*, must be for six months. *Wyburd v. Tuck*, 1 B. & P. 458.

2. If a rector, &c. having made a composition, lease tithes, and the lessee makes no alteration in the composition; when the tithes revert to the rector, &c. the occupier will continue to hold under the composition originally made by the rector, &c.; and, consequently, will be entitled to notice before the rector, &c. can take the tithes in kind. *Wyburd v. Tuck*, 1 B. & P. 458.

3. Where the lessee of tithes for one year underlets to the occupiers, the lessee for the following year is liable to the owner, though no notice has been given to the occupiers to determine the composition. *Cox v. Brain*, 3 Taunt. 95.

4. A notice to determine a composition of tithes must be unequivocal. A demand of "tithes vicarial," and refusal to receive the composition tendered thereupon, are not sufficient. *Fell v. Wilson*, 12 East, 83.

(a 2) *By death of the incumbent.*

Is determined. *Williams v. Powell*, 10 East, 269.

(b) *Proportionable rights of the late and new incumbent.*

Where the composition is continued, the late incumbent's right is the value of the tithe he would have received, had there been no composition. *Williams v. Powell*, 10 East, 269.

(c) *Whether an admission by the occupier of the proprietor's title.*

Yes; operating as an estoppel. *Brooksby v. Watts*, 2 Mars. 38; 6 Taunt. 333.

(d) *Relative to real compositions.*(d 1) *Evidence in support of.*

Must be referrible to a deed of composition. *Knight v. Halsey*, 2 B. & P. 172.

IX. RELATIVE TO THE MODE OF TITHING.

(a) *At common law.*(a 1) *General rules.*

1. Notice of setting out, is not necessary at common law, though it is by the ecclesiastical. *Butler v. Heathby*, 3 Burr. 1891.

2. The tithe ought to be so set out, and the nine parts left so long, that the parson may judge by the view whether it is fairly 'set out.' *Halliwell v. Trappes*, 2 Taunt. 55.

3. A farmer, though he cannot *wantonly*, yet may necessarily, cut and tithe part of a field, and then proceed to another field. *Leathes v. Levinson*, 12 East, 239.

4. Where a field lies in two parishes, the farmer is not bound to cut and tithe the whole of what lies in the parish in which he began to cut, before he proceeds to the other part. *Leathes v. Levinson*, 12 East, 239.

(a 2) *Of wheat.*

Is in the sheaf. *Shallcrop v. Jowle*, 13 East, 261; *Halliwell v. Trappes*, 2 Taunt. 55.

(a 3) *Of grass.*

Must have been tedded previous to putting into grass cocks. *Newman v. Morgan*, 10 East, 5.

(a 4) *Of hay.*

Is in grass cocks. *Halliwell v. Trappes*, 2 Taunt. 55.

(a 5) *Of hops.*

Not until after being gathered from the bind. *Knight v. Halsey*, 7 T. R. 86; 2 B. & P. 172.

(b) *By custom.*(b 1) *Of wheat.*

The consideration of putting sheaves into shocks, and after rain opening them to dry, is sufficient. *Smyth v. Sambrooke*, 1 M. & S. 66.

(b 2) *Of barley.*

The consideration of putting barley (oats, peas or vetches) into cocks, and after rain opening them to dry, and closing them, is not sufficient. *Smyth v. Sambrook*, 1 M. & S. 66.

(b 3) *Of hops.*

Cannot be. *Knight v. Halsey*, 2 B. & P. 172; 7 T. R. 86.

X. RELATIVE TO THE TITHE-OWNER.

(a) *Whether entitled to use an extra occupation-way.*

No; but only that ordinarily used. *Cobb v. Selby*, 2 N. R. 466.

XI. OF THE ACTION FOR TREBLE VALUE.

(a) *Whether an appropriate form for deciding the title to tithes.*

Yes. *Phillips v. Davies*, 8 East, 178; *Holloway v. Hewit*, Loft. 232.—[N.B. The writer has seen an opinion of the late learned Serjeant Williams, denying *Phillips v. Davies*.]

(b) *Of the parties to.*

The party entitled when severed, must sue. *Wyburd v. Tuck*, 1 B. & P. 458.

(c) *Of the defence in.*(c 1) *A modus.*

Is such. *Blundell v. Maudsley*, 15 East, 641.

(c 2) *Proof of non-payment of tithes within living memory.*

Is no defence where declaration avers that they were payable within forty years, &c. *Mitchell v. Walker*, 5 T. R. 260.

(c 3) *Evidence in support of,—a custom in a neighbouring parish.*

In a suit for tithes, where the point in issue is, whether there exists a modus of

a certain sum of money for a particular farm in a township within the parish, though the defendant will not in general be allowed to inquire whether other farms in the same township are not subject to the same payment, yet such inquiry may be made by the other side in cross examination, to shew that such payments cannot be a modus consistently with the evidence which has been previously adduced. *Blundell v. Howard*, 1 M. & S. 292.

(d) *Evidence of title in.*

1. The plaintiff must prove a valid title,—or perception of tithes,—or a composition formerly made. A treaty for a composition which went off, will not do. *Wyburd v. Tuck*, 1 B. & P. 458.

2. An answer to a bill filed in the court of Exchequer, in a suit instituted for tithe hay, by a vicar, against the rector and others (owners of lands in the parish) in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence in an action for tithes by a succeeding rector, against owners or occupiers of the same lands, for the tithes of which the former suit was instituted. *Lady Dartmouth v. Roberts*, 16 East, 334.

(e) *Costs in, for plaintiff.*

Are not due, unless the single value has been found by a jury not to exceed twenty nobles. *Barnard v. Moss*, 1 H. B. 167.

(f) *New trial in.*

May be granted. *Selsea v. Powell*, 6 Taunt. 297.

XII. OF THE REMEDY FOR NOT REMOVING.

(a) *General rule.*

Is by action or distress. Cannot turn in cattle upon the land out of which, &c. *Williams v. Ladner*, 8 T. R. 72.

(b) *Action for.*

(b 1) *Preliminary notice.*

1. A general notice to remove all the tithes of his lands, having a few days before been preceded by a notice that they would be set out, specifying their kind, and from what land, is sufficient. *Kemp v. Filewood*, 11 East, 358.

2. Where tithes are set out on the day specified in a previous notice, a second

notice to remove them, though they have then become rotten, is sufficient to maintain an action for neglect. *Kemp v. Filewood*, 11 East, 358.

TOLERATION ACT.

OFFENCES AGAINST.

(a) *Of penalties incurred by joint convicted offenders*, p. 941.

(b) *Indictment for at sessions,—whether removable before trial*, p. 941.

(a) *Of penalties incurred by joint convicted offenders.*

Each incurs a 20 l. penalty. *Rex v. Hube*, 5 T. R. 542.

(b) *Indictment for, at sessions,—whether removable before trial.*

Yes. *Rex v. Hube*, 5 T. R. 542.

TOLL.

I. RELATIVE TO TOLL TRAVERSE.

(a) *The consideration thereof is necessarily implied*, p. 942.

(b) *Example of a valid consideration*, p. 942.

(c) *Declaration,—statement of a consideration*, p. 942.

II. RELATIVE TO TOLL THOROUGH.

(a) *Example of a void consideration*, p. 942.

(b) *Presumption in support of*, p. 942.

(c) *Whether may be severed from the soil whence it arises*, p. 942.

(d) *Declaration for,—statement of a consideration*, p. 942.

III. RELATIVE TO MARKET TOLL ON SALES BY SAMPLE.

(a) *Prescription for*, p. 942.

(b) *Evidence in support of the claim*, p. 942.

(c) *Of such sale being in fraud of the right to toll*, p. 942.

- (d) *Of such sale being, in legal effect, a sale in bulk*, p. 943.

IV. RELATIVE TO THE MODE OF COMPUTATION.

- (a) *Under 14 Geo. III, c. 82, s. 2, on an overweight*, p. 943.

V. RELATIVE TO EXEMPTION FROM.

- (a) *Clause of, its construction*, p. 943.

VI. RELATIVE TO THE GRANT OF.

- (a) *Its construction*, p. 943.

VII. OF ACTIONS FOR.

- (a) *Demanding toll,—declaration*, p. 943.
 (b) *Ejectment for,—by a mortgagee of part*, p. 943.

VIII. OF DISTRESS FOR.

- (a) *When not allowable*, p. 943.

IX. OF THE WRIT DE ESSENDO QUIETUM DE THEOLONIO.

- (a) *Of counting thereon*, p. 943.

I. RELATIVE TO TOLL TRAVERSE.

- (a) *The considerations thereof is necessarily implied.*

Colton v. Smith, Cowp. 48; *Lord Pelham v. Pickersgill*, 1 T. R. 660.

- (b) *Example of a valid consideration.*

Prescription as lord of the manor for toll of all goods landed within the manor, in consideration of repairing a wharf within the manor (not confining it to the wharf.) *Colton v. Smith*, Cowp. 47.

- (c) *Declaration in,—statement of a consideration.*

Is unnecessary. *Lord Pelham v. Pickersgill*, 1 T. R. 660. But if stated, is material. *Cowp. supra*; *Lofft*. 464.

II. RELATIVE TO TOLL THOROUGH.

- (a) *Example of a void consideration.*

A prescription for toll through the streets of a town, in consideration of repairing divers streets there, was held ill, because it did not say he repaired all the streets there. *Fryman v. Walgham*, 3 Wils. 296. But see *Lofft*. 465.

- (b) *Presumption in support of.*

If it can be shewn that the ownership in the soil of a highway was originally in such a one, and that as well that as the right to a toll thorough, and the passage over the soil were coeval, it will be presumed that the right of way was originally granted, subject to the toll; and so the toll will be *prima facie* valid. The party disputing the right will then have to shew that the right of way existed before toll was claimed. *Lord Pelham v. Pickersgill*, 1 T. R. 660.

- (c) *Whether may be severed from the soil whence it arises.*

Yes. *Pelham v. Pickersgill*, 1 T. R. 660.

- (d) *Declaration for,—statement of a consideration.*

Is essential. *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402; 1 T. R. 660.

III. RELATIVE TO MARKET TOLL ON SALES BY SAMPLE.

- (a) *Prescription for.*

Cannot be supported. *Hill v. Smith*, 4 Taunt. 520.

- (b) *Evidence in support of the claim.*

Proof that toll has always been taken for a commodity sold in the market by sample, which on the preceding market day had been brought into the market in bulk, but afterwards removed to a warehouse for want of buyers; coupled with proof of toll having been taken for the last 40 years on all sales by sample of such commodity; is evidence whence a general right to toll on sales thereof by sample, may be inferred, though a time is remembered when it was not taken. *Hill v. Smith*; 10 East, 476.

- (c) *Of such sale being in fraud of the right to toll.*

A corporation being entitled, by prescription, to toll on all wheat brought into the market, and there sold on a market day, but in which of late it had become the practice to sell by sample, and upon which sale by sample they had claimed the like toll for corn sold in the market; held, that where A. bought of B. in the market, by sample, to be delivered in the borough, A. knowing B. not to be a free-

man, exempt from the toll, and the corn not to have been in the market, and the toll not to have been paid, and which corn was the next day delivered; the corporation could not maintain case against A. for such sale in fraud of the toll. *Tewkesbury Corporation v. Diston*, Smith, 508; 6 East, 438.

(d) *Of such sale being, in legal effect, a sale in bulk.*

Is not, even *prima facie*. *Tewkesbury Corporation v. Diston*, 6 East, 438; 2 Smith, 508.

IV. RELATIVE TO THE MODE OF COMPUTATION.

(a) *Under 14 Geo. III, c. 82, s. 2, on an overweight.*

The additional toll must be according to the progressive proportions named therein. *Chamberlain v. Songhurst*, Cowp. 365.

V. RELATIVE TO EXEMPTION FROM.

(a) *Clause of,—its construction.*

A provision exempting horses from toll, "when attending cattle returning from pasture," only applies to horses actually in company with the cattle. *Harrison v. Brough*, 6 T. R. 706.

VI. RELATIVE TO THE GRANT OF.

(a) *Its construction.*

The usage under an antient grant of toll generally on specific goods passing in and out of a city, has been, to take 2d. for every horse drawing the cart containing the goods. The like toll is payable in whatever description of carriage they may be conveyed, and though principally designed and used for a different purpose to that of conveying goods. *The Corporation of Carlisle v. Wilson*, 5 East, 2; 1 Smith, 297.

VII. OF ACTIONS FOR.

(a) *Demanding toll,—declaration.*

An averment in a declaration by the owner of a market, claiming toll in specie, —that he is entitled to toll for goods sold within the market, means exclusively, toll for goods brought into the market, and not as well for those sold therein by sample. *Moseley v. Pierson*, 4 T. R. 104.

(b) *Ejectment for.*

(b1) *By a mortgagee of part.*

Ejectment for the toll-houses, &c. lies by the mortgagee of a proportion of the tolls mortgaged for an advance thereon, though the act directs that the different mortgagees shall be creditors in equal degree. *Doe, ex dem. Banks, v. Booth*, 2 B. & P. 219.

VIII. DISTRESS FOR.

(a) *When not allowable.*

On the fraudulent sale of goods out of the market. *Blakey v. Dinsdale*, Cowp. 661.

IX. OF THE WRIT DE ESSENDO QUIETUM DE THEOLONIO.

(a) *Of counting thereon.*

Is allowable in the first instance. *Corporation of Lynn v. Corporation of London*, 4 T. R. 130; 6 T. R. 778; 1 H. B. 206; 1 B. & P. 487.

===== TONE, RIVER OF.

BRIDGE OVER.

(a) *Who bound to repair.*

The county were held not liable to repair the bridge over the Tone, whilst the trustees under stat. 49 Geo. III, c. 84, were executing, and before they had completed, the powers thereby given. *Res v. Inhabitants of Somerset*, 16 East, 305.

===== TRADE.

I. OF TRADE IN GENERAL.

(a) *Treaties relative to.*

(a1) *Between Great Britain and America*, p. 944.

(b) *By a neutral*, p. 944.

(c) *Contraband.*

(c1) *Seizure of, before landing*, p. 944.

(d) *Of exportation.*

(d1) *What accounted such*, p. 944.

(d2) *Of the bond given for securing the shipping of glass*, p. 944.

(e) *In relation to the vessel employed*, p. 944.

(f) *Of licenses*, p. 944.

(g) *Statutes relative to*.

(g 1) 12 Car. II, c. 4, p. 945.

(g 2) 15 Car. II, c. 7, p. 945.

(g 3) 16 Geo. III, c. 5, p. 945.

(h) *Penal statutes relative to*.

(h 1) 8 Ann, c. 7, p. 945.

(i) *Penal actions relative to*.

(i 1) *Joinder of counts in*, p. 945.

(k) *Evidence relative to*.

(k 1) *A certificate of the landing abroad of goods exported, pursuant to 11 & 12 W. III, c. 10, s. 2*, p. 945.

(l) *Of the right of survivorship amongst joint traders*, p. 945.

II. OF THE UNQUALIFIED EXERCISE OF TRADES WITHIN STAT. 5 ELIZ. c. 4.

(a) *What considered as, or not*, p. 945.

I. OF TRADE IN GENERAL.

(a) *Treaties relative to*.

(a 1) *Between Great Britain and America*.

Under the treaty of 1794, between this country and America, it was not necessary that the trade conceded to the Americans by the 13th Article, should be direct from America to the British settlements in the East Indies. *Wilson v. Marryat*, 8 T. R. 31; 1 B. & P. 430.

(b) *By a neutral*.

1. A neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality; provided that neither the voyage nor commerce be of a hostile description, or otherwise expressly or impliedly forbidden by the law of this country; although such ship, in consequence of carrying enemy's property, be liable to detention, or the being carried into British ports for the purpose of search. *Barker v. Blakes*, 9 East, 283.

2. A neutral meeting, by agreement, a British vessel, for the purpose of receiving gunpowder and arms, is illegal, and a ground of condemnation, though the latter

should have a license to export them for the purposes of trade. *Gibson v. Mair*, 1 Mars. 39; *Gibson v. Service*, 1 Mars. 119; 5 Taunt. 433.

(c) *Contraband*.

(c 1) *Seizure of, before landing*.

Not justifiable before landing, or offer for sale. *Smyth v. Reynolds*, 2 Wils. 257.

(d) *Of exportation*.

(d 1) *What accounted such*.

1. Not a clearing at the custom-house. *Williams v. Marshall*, 7 Taunt. 468; 1 Moore, 168.

2. Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect the cargo from duties subsequently imposed on the exportation of goods of the same nature, although she is not only freighted and afloat, but has gone through all the formalities of clearing, &c. at the custom-house, and has paid the exportation duties. And all such new imposts as are laid on such goods attach while the vessel is water-borne within any part of the port. *Attorney General v. Pougett*, 2 Price, 381.

(d 2) *Of the bond given for securing the shipping of glass*.

See *Attorney General v. Pole*, 1 Price, 387, previous to the stat. 55 Geo. III, c. 113.

(e) *In relation to the vessel employed*.

1. A privilege given by act of parliament to ships belonging to any state in amity with his Majesty, and manned with foreigners, to import merchandize otherwise prohibited, does not extend to foreign-built ships British-owned. *Attorney General v. Wilson*, 3 Price, 431. See 4 Camp. 364.

2. A ship of foreign built (American) belonging wholly to a British subject, and manned with foreign seamen (with an English mate) is not, as within the 43 Geo. III, c. 153, entitled to import flax-seed from Russia. *Attorney General v. Wilson*, 3 Price, 431.

(f) *Of licenses*.

1. Whether a license for a ship "to be employed in the coasting trade," generally, is good. *Gossley v. Barlow*, 1 Aust. 23.

2. If a cutter obtains a license from the Admiralty "as intended to proceed on a voyage to Lisbon," and sails upon a different voyage, she is liable to forfeiture, and may be seized, although then lying in her original port. *The Attorney General v. Brown*, 3 Anst. 720.

3. See, in relation to the oyster fishery, *Attorney General v. Roote*, 3 Anst. 725.

4. The exportation of the excess only of gunpowder beyond the licensed quantity, is illegal. *Keir v. Andraade*, 2 Mars. 136; 6 Taunt. 498.

(g) *Statutes relative to.*

(g 1) 12 Car. II, c. 4.

Colonial produce of the plantations cannot be transported from thence direct to any place in Europe. *Lubbock v. Potts*, 3 Smith, 401; 7 East, 449.

(g 2) 15 Car. II, c. 7.

1. The exportation of European manufactures from the Cape to any port to the eastward in his Majesty's possession, is illegal. *Gray v. Lloyd*, 4 Taunt. 136.

2. Was not suspended by either order in council, 12th April 1809, and 1st Oct. 1811. *Gray v. Lloyd*, 4 Taunt. 136.

(g 3) 16 Geo. III, c. 5.

American property on board a neutral ship, not trading to any port or place of the American colonies, was not forfeited. *Tyson v. Gurney*, 3 T. R. 477.

(h) *Penal statutes relative to.*

(h 1) 8 Ann, c. 7.

Is prospective in construction and operation. *The Attorney General v. Saggars*, 1 Price, 182.

(i) *Penal actions relative to.*

(i 1) *Joinder of counts in.*

A count founded on the statute of 8 Ann, c. 7, s. 17, is not inconsistent with a count on the 6 Geo. III, c. 19, s. 1, although evidence of a single act might be sufficient to support both counts. *The Attorney General v. Saggars*, 1 Price, 182.

(k) *Evidence relative to.*

(k 1) *A certificate of the landing abroad of goods exported pursuant to 11 & 12 W. III, c. 10, s. 2.*

Is not evidence thereof. A certificate under that act is proved by proof of the

signatures only. *Rex v. Vyse*; *Rex v. Spearpoint*; Forrester. 35.

(l) *Of the right of survivorship amongst joint traders.*

Rights in action belonging to traders, survive. *Secus* property in possession. *Rex v. Liverpool Collector*, 2 M. & S. 223.

II. OF THE UNQUALIFIED EXERCISE OF TRADES WITHIN ST. 5 ELIZ. c. 4.

(a) *What considered as or not.*

1. Not the employment as a journeyman. *Beach v. Turner*, 4 Burr. 2449.

2. Working at a trade for seven years qualifies. *French v. Adams*, 2 Wils. 168.

3. Service by an apprentice with a second master of the same trade, as and by consent of the first, qualifies. *Rex v. Holy Trinity, Minories*, 3 T. R. 608.

4. Query, as to a capitalist trading without manual interference. *Keen v. Donnay*, 15 East, 161.

TREASON.

WHAT CONSIDERED AS.

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(b) *Sending intelligence to the enemy*, p. 945.

(a) *Attempt to compel the repeal of a law by intimidation and violence.*

Rex v. Lord George Gordon, Dougl. 590.

(b) *Sending intelligence to the enemy.*

Which in anywise is intended to be and may be of service to them in their operations against us, though intercepted. *Rex v. Stone*, 6 T. R. 527.

TREES.

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(b) *Whether in a tenant for life dispensable on severance*, p. 946.

- (c) *After entry, to avoid a fine,*
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- (a) *Determination of.*
(a 1) *By severance, p. 946.*

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- (a) *By special custom, p. 946.*

IV. CONVICTIONS RELATIVE TO.

- (a) *Under stat. 6 Geo. I, c. 48.*
(a 1) *Of ascertaining the costs
in the conviction, p. 946.*

I. PROPERTY OF,—IN WHOM VESTED.

- (a) *On severance for an unjustifiable
purpose.*

Immediately vests in the general owner.
Blackett v. Lowes, 2 M. & S. 494.

- (b) *Whether in a tenant for life dispen-
sable, on severance.*

Yes. *Pyne v. Dor, 1 T. R. 55.*

- (c) *After entry, to avoid a fine.*

The entry has no relation with respect
to trees felled. *Hughes v. Thomas,*
13 East, 474.

II. SPECIAL OWNERSHIP IN.

- (a) *Determination of.*
(a 1) *By severance.*

Is determined. *Blaker v. Anscombe,*
1 N. R. 25.

III. TIMBER,—WHAT CONSIDERED AS.

- (a) *By special custom.*

Where, by the custom of the country,
certain trees are accounted timber, any
qualifications rendered by the custom ne-
cessary to give them that character, which
are not required by the general rule of law
relating to timber, are void. *Aubrey v.*
Fisher, 10 East, 446.

IV. CONVICTIONS RELATIVE TO.

- (a) *Under stat. 6 Geo. I, c. 48.*
(a 1) *Of ascertaining the costs in the
conviction.*

Must be ascertained. *Rae v. Hall,*
Cowp. 60.

TRESPASS.

I. IN GENERAL.

- (a) *When maintainable.*
(a 1) *From the abuse of an au-
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(b) *Pleadings in.*
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- (c) *Of staying proceedings in*, p. 949.

I. IN GENERAL.

- (a) *When maintainable*.
 - (a 1) *From the abuse of an authority in law*.

By abusing an authority in law, the party becomes a wrong-doer *ab initio*. Hence, though an animal has been properly seized as an estray, yet, if it be afterwards worked, trespass lies. *Oxley v. Watts*, 1 T. R. 12.

- (b) *Pleadings in*.
 - (b 1) *Declaration*,—overt "that whereas"

In K. B. by bill, the allegation that *whereas* in trespass is bad; but in C. B.

the defect is aided by the recital of the original. *White v. Shaw*, 2 Wils. 203.

- (b 2) *New assignment*,—when proper or allowable.

Not where only one act of trespass has been committed, and the defendants' attempt to justify such act cannot be supported. *Oakley v. Davis*, 16 East, 82; *Taylor v. Smith*, 7 Taunt. 156.

- (b 3) *In the case of an abuse of authority*.

1. If a defendant, by the abuse of an authority in law, has made himself a trespasser *ab initio*, and the plaintiff declares in the same count, first for the original act, which might have been justified had not the authority been deviated from, and then for the subsequent outrage or abuse; the defendant, by justifying the previous act, under the authority in law, answers the entire cause of complaint; and the plaintiff, in order to cut down the defence, must reply the subsequent abuse. *Taylor v. Cole*, 3 T. R. 292; 1 H. B. 555.

2. If a trespass was greater than the occasion rendered necessary, the plaintiff, where the abuse was of an authority in law, will reply the excess; *Gates v. Bayley*, 2 Wils. 313; *Dye v. Leathordale*, 3 Wils. 20; *Moore v. Taylor*, 5 Taunt. 69; otherwise he will newly assign it. *Weaver v. Bush*, 8 T. R. 78.

- (c) *Evidence in*.

- (c 1) *Of matters in aggravation*.

May be given in evidence. *Bracegirdle v. Oxford*, 2 M. & S. 79.

- (c 2) *After judgment by default, as to some*.

In trespass against several, if any suffer judgment by default, the plaintiff need only give evidence to affect the rest; and it is matter for the jury, whether the trespass proved be the same as that confessed; but the plaintiff cannot be non-suited. *Harris v. Butterley*, Cowp. 483. Vide *Sedley v. Sutherland*, 3 E. N. P. C. 202; *Aaron v. Alexander*, 3 Camp. 36; *Nicholl v. Glennie*, 1 M. & S. 588.

- (d) *Costs in*.

- (d 1) *Deduction of the costs of a defendant convicted, from those of a defendant acquitted*.

In trespass *cl. fr.* two defendants suffered judgment by default, and the third

had a verdict. Damages being assessed against the two former, a rule was granted for deducting the costs and damages taxed and assessed on the judgment by default, out of the costs taxed on the *postea*, for the defendant who obtained the verdict; on an affidavit, that the defendants who suffered the judgment by default, had acted under the authority of the other defendant, who had undertaken to pay the damages and costs, *Schoole v. Noble*, 1 H. Blk. 23.

II. TO THE PERSON.

(a) Pleadings.

(a 1) Plea,—defence of possession.

In trespass for throwing water upon the plaintiff, and into her apartment, the defendant pleaded that the plaintiff had begun wrongfully to block up the defendant's window in a house contiguous to the plaintiff's room; that he prayed her to desist, and upon her refusal, threw a little water into the room to hinder, &c. Plea held bad. *Simpson v. Morris*, 4 Taunt. 821.

(a 2) Replication,—to a plea of a *ca. ad ea.*, that it was excessive, and ordered to be quashed.

"The writ ought only to have issued for so much, and the court afterwards, on motion, ordered it to be quashed," imports that it was quashed for the excess only. *King v. Harrison*, 15 East, 612.

III. TO REAL PROPERTY.

(a) Of the title sufficient to maintain.

Bare possession is sufficient. *Graham v. Peat*, 1 East, 244; *Catteris v. Cowper*, 4 Taunt. 547.

(b) Whether a continuation of the same, or a distinct trespass.

An entry by the sheriff under a *fi. fa.* sale of goods, and keeping possession till after the return of the writ, is one trespass only. *Aikinhead v. Blades*, 1 Mars. 17; 5 Taunt. 198.

(c) Justification of,—hunting a fox.

Is good. *Gundry v. Feltham*, 1 T. R. 334; vide *Nicholas v. Badger*, 3 T. R. 259, n.

(d) Pleadings in.

(d 1) Declaration,—specific description of the property.

The description need not be by name

or abutments. *Martin v. Kesterton*, 2 Blk. 1089.

(d 2) Plea,—whether special,—in the case of title.

Title in one's self, or under another, is evidence under not guilty. *Dodd v. Kyffin*, 7 T. R. 354; *Argent v. Durrant*, 8 T. R. 403.

(d 3) Plea,—whether special,—in the case of an easement.

Yes. *Hawkins v. Wallis*, 2 Wils. 173.

(d 4) Plea,—whether special,—in the case of a license.

Yes. *Bennett v. Allcott*, 2 T. R. 166.

(d 5) Replication,—to a plea of prescriptive right appurtenant.

A denial of the right does not involve the defendant's possession of the land to which, &c. *Stott v. Stott*, 16 East, 343.

(d 6) Replication,—traversing the command.

Is allowable. *Chambers v. Donaldson*, 11 East, 65.

(d 7) Rejoinder,—argumentative.

The plaintiff replied to a plea in trespass, claiming common in the *locus in quo*, an adverse possession of twenty years, and the defendant rejoined that the part in which the trespass was committed, was inclosed within twenty years;—held, that the rejoinder was bad, being an argumentative denial of the replication; the whole of which, had it been put in issue directly, the plaintiff must have proved. *Hawke v. Bacon*, 2 Taunt. 156.

(d 8) New assignment,—when proper or allowable.

1. Where the defendant, having justified an entry with which he was charged under a *fi. fa.*, the plaintiff replied by taking issue on the plea, and also newly assigning an entry, after the return of the writ; on special demurrer, the defendant had judgment. *Cheasley v. Barnes*, 10 East, 73.

2. Trespass for breaking the plaintiff's close on such a day, and on divers other days, within a given period; plea of license at the said several times; replication traversing that he entered by license at the said several times. Proof, by plaintiff, of four acts of trespass, and by defendant of a license, which covered

only two. Held, that plaintiff should recover for the other two. *Barnes v. Hunt*, 11 East, 451.

3. The defendant is entitled to a verdict on not guilty, to a new assignment in trespass, setting out the *locus in quo*, by abutments, and averring that it is different from that mentioned in the plea, which claimed under an allotment by the leet jury, if in truth it is the same. *Pratt v. Groome*, 15 East, 235.

(e) *Costs in.*

(e1) *Against inferior tradesmen.*

The stat. 4 & 5 W. & M. c. 23, s. 10, only applies where the special circumstances alleged to bring the case within it, are proved. *Pallant v. Roll*, 2 Blk. 900.

IV. TO PERSONAL PROPERTY.

(a) *Possession essential to maintain.*

Either in fact, or in law, is essential. *Smith v. Miles*, 1 T. R. 475.

(b) *Pleadings in.*

(b1) *Declaration,—specific description of the property.*

The not specifying them, is error after verdict. *Bertie v. Pickering*, 4 Burr. 2455.

(b2) *Plea,—whether special,—in the case of prize.*

Capture as prize may be given under not guilty. *Le Caux v. Eden*, Dougl. 594.

(b3) *Plea,—whether may controvert the title to the possession of land.*

Yes, *Taylor v. Eastwood*, 1 East, 212.

(b4) *Plea,—justification in defence of animals fera natura.*

A plea which justifies killing a dog because chasing hares, must at any rate aver that they could not otherwise have been saved. *Vere v. Lord Cawdor*, 11 East, 568.

(b5) *Plea,—miscellaneous.*

If in trespass for cutting the plaintiff's posts, the defendant pleads the general issue and a special justification because they were wrongfully fixed upon his land; since this admits that the property therein remained with the plaintiff, he cannot defend the act under the general issue, on the ground that the property, by the act of annexation, became his own. *Welch v. Nash*, 8 East, 394.

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(b6) *Replication,—to a plea of removal of an obstruction.*

If in trespass for breaking down and carrying away a gate, the defendant justify, and conclude, that *he deposited the gate in a convenient place for the use of the plaintiff*, to which the plaintiff, to make him a trespasser *ab initio*, replies a subsequent conversion; the replication is not supported by proof that the defendant placed the gate upon his own land, since even supposing that to be a conversion, the plaintiff has acknowledged that the defendant was right in so doing, by not denying, and therefore admitting the conclusion of the plea. *Houghton v. Butler*, 4 T. R. 364.

(c) *Of staying proceedings in.*

Where there are no grounds for vindictive damages, proceedings will be stayed on restoring the goods, or paying their value, with the costs. *Pickering v. Truste*, 7 T. R. 53. *Secus*, where this will not end the suit, or the value is not admitted. *Knott v. Barker*, 3 Anst. 896.

TRIAL.

First.

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OF PUTTING OFF THE TRIAL.

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First.

[A] *In Civil Cases.*

I. OF TRIALS AT BAR.

(a) *General rule for granting and refusing.*

All applications for, must be decided on their own circumstances. *Res v. Amery*, 1 T. R. 363; *Lofft*. 159.

(b) *For the satisfaction of the court.*

Is allowable. *Res v. Jolliffe*, 4 T. R. 292.

(c) *Whether granted in an issuable term.*

No. *The Corporation of London v. The Corporation of Lynn*, 1 H. B. 206. See *Lofft*. 159.

II. OF TRIALS BY PROVISIO.

(a) *When allowable in general.*

A defendant cannot go to trial by proviso, unless there has been a default on the part of the plaintiff, though there has been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record. *Worcestershire Canal Company v. Trent Navigation Company*, 1 Mars. 218; 5 Taunt. 577; 6 Taunt. 251.

(b) *Whether allowable in a chancery issue.*

The defendant in an issue directed by the court of Chancery, cannot carry down the record to trial by proviso; but the court will give him leave to carry it down upon a suggestion that the plaintiff means to delay the trial. *Humpage v. Rowley*, 4 T. R. 767.

(c) *Rule for,—its end defined.*

The only use of the rule for trial by proviso, where the record is carried down by proviso by the defendant, is, that if the plaintiff also takes the record down, his alone shall be tried. Therefore, it may be obtained at any time before trial, and even after notice of trial given to the plaintiff. *King v. Pippett*, 1 T. R. 695.

III. OF TRIALS ON ISSUES JOINED IN FACT AND IN LAW.

(a) *In relation to separate actions against several.*

Where separate actions are brought against different individuals for injurious acts arising out of the same transaction, in

one of which a demurrer has been joined, in the others issues in fact, and the important question upon which all turn, is that raised by the demurrer, the trial in the latter will be postponed until the demurrer has been determined. *Burdett v. Colman*, 13 East, 27.

IV. OF TRIALS BY SPECIAL JURY.

(a) *Mode of proceeding, when moved for delay.*

If in a cause standing for trial within the term, it shall be tried within the term. *Bloxham v. Brown*, 4 Taunt. 470.

V. ON THE PLAINTIFF'S OBLIGATION TO PROCEED TO TRIAL.

(a) *With reference to issue joined.*

1. In K. B. he need not give notice of trial before the term succeeding that in which issue is joined. *Hall v. Buchanan*, 2 T. R. 734.

2. The plaintiff has the whole of the term succeeding that in which issue is joined to try the cause. *Baker v. Newman*, 1 H. B. 123.

(b) *In a London cause.*

In a London cause the plaintiff is not bound to go to trial at the sittings after the term in which issue is joined, though joined early enough for that purpose. *Munt v. Tremamondo*, 4 T. R. 557; *Woulfe v. Sholls*, 1 H. B. 282.

VI. OF NOTICE OF TRIAL.

(a) *When requisite or not.*

(a 1) *Where the trial has been put off by defendant.*

A fresh notice of trial is necessary, though it be put off by the defendant. *Ellis v. Trusler*, 2 Blk. 798.

(a 2) *After a peremptory undertaking to try.*

Notwithstanding a peremptory undertaking to try, notice of trial is requisite, without which the defendant is not bound to take any steps, and therefore cannot claim the costs incurred by any steps he may have taken. *Ifield v. Weeks*, 1 H. B. 222.

(a 3) *After a remanet.*

If a cause be made a *remanet*, it may be tried at the next sittings, without a new notice of trial; *secus*, where the trial is put off by rule of court. And even where plaintiff gives a peremptory undertaking

to try at the next sittings or assizes, there, likewise, a new notice must be given, since the plaintiff, notwithstanding such notice, may decline trying his cause. *Jacks v. Mayer*, 8 T. R. 245.

(b) *When given* (Vide *supra*, (a))

(b 1) *Whether may be given pending a rule for changing the venue.*

No. *Moses v. Stevenson*, 1 Taunt. 58.

(b 2) *For the sittings after term in London.*

See the rule, K. B. East, 51 Geo. III; 13 East, 393.

(c) *How given.*

(c 1) *Whether by continuation of a void notice.*

May be, if given within regular time. *Tyte v. Steventon*, 2 Blk. 1298.

(d) *Duration of the notice.*

(d 1) *General rule,—defining the place of residence.*

Is that where defendant resides on delivering the issue. *Spencer v. Hall*, 1 East, 688.

(d 2) *In a town cause,—defendant residing in the country.*

Where the defendant resides above forty miles from London, unless the cause has been treated as a town cause, there ought to be fourteen days notice of trial, though the arrest be made and the venue laid in town. *Brind v. Torris*, 2 Blk. 1205.

(d 3) *In a town cause,—during a temporary residence in the country.*

The common notice is sufficient. *Raine v. Hodgson*, 2 Price, 279.

d 4) *In a town cause,—defendant being abroad.*

Eight days notice is requisite. *Douglas v. Ray*, 4 T. R. 552.

(d 5) *On a change of residence pending action.*

A change of residence pending the action to beyond forty miles from London, does not entitle to the longer notice of trial, unless notified. *Rockfort v. Robertson*, 12 East, 427.

(d 6) *In country causes, treated as town causes.*

A cause which is commenced as a town

cause and not objected to, shall be considered as such in all its subsequent stages, especially after a verdict. *Keddey v. Jordan*, 2 Blk. 992.

(d 7) *Rule relative to short notice in country causes.*

See K. B. East, 30 Geo. III, 3 T. R. 660.

(d 8) *After a year's suspension by injunction.*

When a cause has been suspended for a year after it was at issue, the defendant is entitled to a term's notice of trial; unless himself occasioned its suspension by injunction. *Hayley v. Riley*, Dougl. 71.

(e) *Of the undertaking for short notice for the sittings.*

(e 1) *Whether it extends to the adjourned sittings.*

No. *Abbott v. Abbott*, 7 Taunt. 452; 1 Moore, 160.

(f) *Irregularities in,—how objected to.*

Where the objection on the ground of a mis-trial appears on the record, the verdict will not be set aside for a defect in the notice of trial. *Ambrose v. Rees*, 11 East, 370.

VII. RELATIVE TO THE REGULATION OF THE TRIAL.

(a) *Motions for,—where made.*

To the judge who presides at N. P. *Johnson v. Coke & Gas Light Company*, 7 Taunt. 390.

VIII. RELATIVE TO PUTTING OFF THE TRIAL.

(a) *Motions for.*

(a 1) *When made.*

Not on the last day of term, or so late as not to leave sufficient time for shewing cause therein. *Anon.* 3 Taunt. 315.

(a 2) *Where made.*

Not at Nisi Prius when it might have been made in Bank. C. B. East, 49 Geo. III; 1 Taunt. 565.

(b) *On the affidavit of the attorney's clerk.*

(b 1) *Its form.*

It must state that he managed, and was particularly acquainted with all the circumstances of the cause. *Sullivan v. Magill*, 1 H. B. 627.

(c) *Whether by consent at Nisi Prius.*
No. C. B. Mich. 50 Geo. III, 2 Taunt. 221.

(d) *Pending the absence of witnesses.*
Is no ground where trial might have been had before their departure, but for unnecessary delay. *Saunders v. Pitman*, 1 B. & P. 33. Nor where their testimony is to establish an odious defence. *Robinson v. Smyth*, Id. 454. Nor where the case is suspicious, and they are foreigners resident abroad, and not likely to come over. *Rex v. Chevalier D'Eon*, 3 Burr. 1513; 1 Blk. 510; Loft. 653; 769. But the fact of their departure before action brought, is no objection. Loft. 329.

(e) *To procure a commission to examine witnesses.*

Is no ground where an opportunity to procure it has been once lost by neglect. *Calliand v. Vaughan*, 1 B. & P. 210.

(f) *Pending an indictment against the plaintiff.*

The trial in an action against a banker, for money paid in, was postponed until an indictment against the plaintiff for a theft had been tried, on a surmise that this was the produce of the felony. *Deakin v. Praed*, 4 Taunt. 825.

IX. OF ENTERING THE TRIAL ON THE RECORD.

(a) *In relation to the jurors.*

It must appear on the record that the trial was had by twelve jurors. *Rex v. St. Michael, Southampton*, 2 Blk. 718.

X. MIS-TRIAL.

(a) *Objection to,—how taken.*

Unless when cured by statute, may be by motion in arrest of judgment. *Goodright v. Williams*, 2 M. & S. 270.

(b) *When cured by the statutes of jeofails.*

Only where the trial has been by a jury of the proper county. *Goodright v. Williams*, 2 M. & S. 270.

Secondly.

[B.] *In Criminal Cases.*

I. OF TRIALS BY PROVISIO.

(a) *Where the King or Attorney General is prosecutor.*

Cannot be. *Rex v. Dyde*, 7 T. R. 661; *Rex v. Macleod*, 2 East, 202.

II. AFTER AN INDICTMENT HAS BEEN REMOVED INTO K. B.

(a) *Whether at Bar or Nisi Prius.*
May be at either. *Rex v. Thomas*, 4 M. & S. 442.

III. TIME ALLOWED FOR.

(a) *On the issue of identity of person.*
Trial must be *instanter*. *Rex v. Rogers*, 3 Burr. 1809.

IV. ON THE ADJOURNMENT OF THE TRIAL.

(a) *Prisoner's consent,—whether essential to.*
No. *Rex v. Stone*, 6 T. R. 527.

Thirdly.

[C] *Of a Penal Information.*

OF PUTTING OFF THE TRIAL.

(a) *On the ground of delay.*

If there has been any delay in the interval between the first process issuing against a defendant, and the filing of the information against him, and during that interval he has gone abroad on his duty, as well as some of his witnesses, the court will postpone the trial on motion. *The Attorney General v. Thacker*, 2 Price, 116.

TROVER.

I. BY WHOM MAINTAINABLE.

- (a) *General rule*, p. 954.
- (b) *By one in possession, under an assertion of title*, p. 954.
- (c) *By one in possession, with the owner's consent*, p. 954.
- (d) *By the owner of property entrusted to a servant or carrier*, p. 954.
- (e) *By the payee of part of undivided fund*, p. 954.
- (f) *By an officer, the purchaser of horses for government*, p. 954.

II. AGAINST WHOM MAINTAINABLE.

- (a) *Carriers, wharfingers, &c. where the property is lost through negligence*, p. 954.

III. OF THE CONVERSION NECESSARY TO THE MAINTENANCE OF TROVER.

- (a) *The assumption of dominion*, p. 954.
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 - (b 1) *To one in unauthorized possession*, 955.

V. PRACTICE RELATIVE TO.

- (a) *Of bringing the property into court*, p. 955.

I. BY WHOM MAINTAINABLE.

- (a) *General rule.*

The right to present possession when converted, is essential. *Gordon v. Harper*, 7 T. R. 9.

- (b) *By one in possession, under an assertion of title.*

Is sufficient. *Rackham v. Jessup*, 3 Wils. 332.

- (c) *By one in possession, with the owner's consent.*

Is sufficient. *Sutton v. Buck*, 2 Taunt. 302.

- (d) *By the owner of property entrusted to a servant or carrier.*

May maintain. *Gordon v. Harper*, 7 T. R. 12.

- (e) *By the payee of part of an undivided fund.*

If A, having received a bag of dollars, with directions to pay over a certain number to B, appropriate the whole, he is liable to B. in trover. *Jackson v. Anderson*, 4 Taunt. 24.

- (f) *By an officer, the purchaser of horses for government.*

Held maintainable by a colonel who had purchased horses for government, and they being approved of by the proper inspecting officer, were sent, under the care of a serjeant, to the receiving depôt for his majesty's use, and distrained in transitu. *Hopkinson v. Gibson*, 2 Smith, 202.

II. AGAINST WHOM MAINTAINABLE.

- (a) *Carriers, wharfingers, &c. where the property is lost through negligence.*

Does not lie. *Ross v. Johnson*, 5 Burr. 2825. *Infra*, III. (g)

III. OF THE CONVERSION NECESSARY TO THE MAINTENANCE OF TROVER.

- (a) *The assumption of dominion.*

Assuming a dominion over property without right, is a conversion. *Shipwick v. Blanchard*, 6 T. R. 298. So, refusing to restore property, *Lofft*. 89.

- (b) *An unauthorized detention, on the ground of lien.*

Is a conversion. *Dewell v. Maxon*, 1 Taunt. 391.

- (c) *An unauthorized user of property bailed.*

Is a conversion. *Syeds v. Hay*, 4 T. R. 260.

- (d) *The transfer of property into another's name.*

Where A, a broker, purchased tobacco for B, and placed it in the king's warehouse in his own name, and then transferred it into the name of C, as a pledge; held, that B, after demanding the tobacco of C, and his refusal to deliver it up, might have trover. *McCombie v. Davies*, 2 Smith, 557; 6 East, 538.

- (e) *The indorsement and delivery of a bill of lading.*

Is a conversion, though the transfer is

TROVER.

ineffectual, *Jackson v. Anderson*, 4 Taunt. 24.

(f) *The discounting, &c., after notice, a lost bill.*

The discounting by a banker, after notice, a lost bill, made payable at his house, debiting the acceptor, and handing over to him the bill, with a discharge written thereon, is a conversion as against the loser. *Lovell v. Martin*, 4 Taunt. 799.

(g) *Negligence in an agent.*

Is not a conversion. *Bromley v. Corwell*, 2 B. & P. 438. *Supra*, II.

(h) *In relation to sales void by bankruptcy.*

(h 1) *Individuality of first with second vendee.*

The bankrupt, before his bankruptcy, made a *bond fide*, though defective transfer of a ship. After his bankruptcy, the vendee sold it to another, who sent it to sea, where it foundered. Held, a conversion in the first vendee. *Bloxham v. Hubbard*, 5 East, 407; 1 Smith, 487.

IV. OF PRELIMINARY STEPS TO THE MAINTENANCE OF TROVER.

(a) *Demand of possession.*

(a 1) *On a bailment determined by an unauthorized user.*

Is unnecessary. *Atkinson v. Maling*, 2 T. R. 463.

(b) *Tender in satisfaction of lien.*

(b 1) *To one in unauthorized possession.*

Is unnecessary. *Lemprier v. Pasley*, 2 T. R. 485.

V. PRACTICE RELATIVE TO.

(a) *Of bringing the property into court.*

Is allowable where the chattel is specific, the value, quality, and quantity are ascertained, and there are no grounds for damages beyond the value,—otherwise not. *Fisher v. Prince*, 3 Burr. 1363; *Whitten v. Fuller*, 2 Blk. 902.

TRUST.

I. RELATIVE TO THE CREATION OF.

(a) *In the case of the assignment by a cestuy que trust, to a feme covert*, p. 956.

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II. RELATIVE TO THE DECLARATION OF USES.

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III. RELATIVE TO TRUSTS EXECUTED BY THE STATUTE.

(a) *General rule*, p. 956.

(b) *Examples*, p. 956.

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(a) *General rules*, p. 956.

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V. RELATIVE TO SATISFIED TRUSTS.

(a) *Properties of*, p. 957.

(b) *Who entitled to the beneficial interest therein*, p. 958.

VI. RELATIVE TO THE SURRENDER OF TRUSTS.

(a) *Presumption of.*

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(d) *Privileges of.*

(d 1) *In relation to his trustee*, p. 960.

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(a) *Responsibility of, for private injuries or demands*, p. 960.

- (b) *Responsibility of, for the acts of their agents*, p. 960.
- (c) *Responsibility of, — whether joint or several*, p. 961.
- (d) *Treasurer of, suits against.*
 - (d 1) *Where the injurious act is that of some of the trustees only*, p. 961.

I. RELATIVE TO THE CREATION OF.

- (a) *In the case of the assignment, by a cestui que trust, to a feme covert.*

Lands are devised to trustees to receive the rents and profits, and pay a certain portion to A; A. assigns part of her share to B, a married woman, to her separate use. Held, that the trustees under the will must be considered as trustee for B, so that her husband could not sue A. for his wife's share received by her. *Firth v. Purvis*, 5 T. R. 432.

II. RELATIVE TO THE DECLARATION OF USES.

- (a) *Implication of, where lands are included in the general sweeping clause.*

Will not be made. *Moore v. Magrath*, Cowp. 9.

III. RELATIVE TO TRUSTS EXECUTED BY THE STATUTE.

(a) *General rule.*

A devise upon trust to permit a person to receive the rents and profits, will, unless restrained, vest the legal estate in that person, which in this case it was held not to be by special provisions. And unless it be necessary for the purposes of the trust that the trustees should have the legal estate. *Harton v. Harton*, 7 T. R. 652; *Right*, ex dem. *Phillipps, v. Smith*, 12 East, 455.

(b) *Examples.*

1. As to my real and personal estate, subject to my debts and funeral expenses; I devise my real estates, and also my personal estate, unto A. and B. and their heirs, on the following trusts:—to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as to my real estate, subject to my debts and such charges as I may make, I devise the same to C. for life.

C, not the trustees, takes the legal estate in the realty. *Kenrick v. Lord W. Beauchamp*, 3 B. & P. 175.

2. Devise, that the trustee should pay unto, or else permit and suffer the testator's niece to receive the rents, the legal estate was held to be in the niece. *Doe v. Biggs*, 2 Taunt. 109.

3. Where lands were conveyed to trustees and their heirs in trust, that the trustees should, with the consent of A, sell the inheritance in fee, and apply the purchase money to certain trusts mentioned in the deed, with a proviso that the rents, issues, and profits, until the sale of the inheritance should be received by such person and for such uses as they would have been if the deed had not been made; held, that notwithstanding the proviso, the estate was executed in the trustees immediately. *Keane v. Deardon*, 8 East, 248.

IV. RELATIVE TO TRUSTS NOT EXECUTED BY THE STATUTE.

(a) *General rules.*

1. Where trustees are to receive and pay over the rents and profits, the use is not executed, since for the purposes of the trust it is necessary that they have the legal estate. Much more where they are to exercise a discretion in applying the profits, as where they are directed to take the rents and apply them for the subsistence and maintenance of the cestui que trust. *Silvester*, ex dem. *Law*, v. *Wilson*, 2 T. R. 444.

2. It cannot be inferred, from a testator changing from the word "use" to "trust," that his intention is that the estate, where the former word is used, shall be executed, but not the latter. *Doe*, ex dem. *Terry*, v. *Collier*, 11 East, 377.

3. Release to A. and B. and their heirs, *habendum* "to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns forever;" not adding "as tenants in common." The question whether A. and B. are joint tenants or tenants in common, depends upon whether the use is executed by the statute or not; if executed, they are the former; if not executed, the latter. The use is not executed, it being a rule that where the party seised to the use and the cestui que use, are one and the same person, the

statute has no operation, unless it be impossible or impertinent for the use to take effect by the common law. *Doe, ex dem. Hutchinson, v. Prestwidge*, 4 M. & S. 178.

(b) *Examples.*

1. Freehold and leasehold premises are devised to trustees in fee, in trust for the use of A. (an infant) for ninety-nine years, if he should so long live, and after that term, to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of ninety-nine years, as they shall be in seniority of birth; and in default of such issue male in him or them, then to B, and the issue male of his body, for the like term of ninety-nine years; and in default of such issue male, then to the right heirs of the deviser. Held, that the limitation to the trustees gave them the absolute interest in the freehold and leasehold property, subject to the trusts; that none of the subsequent limitations were uses executed by the statute; that if they had been executed, A. would have taken for ninety-nine years determinable with his life, and his first son would have taken a like estate at his death; but that all the other limitations would have been void. *Somervill v. Lethbridge*, 6 T. R. 213.

2. Limitation by deed to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying "during her life") in trust, to support the contingent uses and estates thereafter limited, remainder to the first and other sons, &c. The words within the inverted commas cannot be supplied, so that the estates subsequent to the wife's are equitable. *Venables v. Morris*, 7 T. R. 342, 438.

3. Under a devise to trustees and their heirs, upon trust to permit a married woman to receive the rents and profits during her life, for her own sole and separate use, notwithstanding her coverture, and without being in anywise subject to the debts or controul of her then or after taken husband, and her receipt alone to be a sufficient discharge. Held, that the legal estate was vested in the trustees; for it being the testator's intention to secure to the wife a separate allowance, free from the controul of her husband, it was essentially necessary that the trustees

should take the estate with the use executed, in order to effectuate that intention, otherwise the husband would be entitled to receive the profits, and defeat the very object which the testator had in view. *Harton v. Harton*, 7 T. R. 657.

4. A. devises land to trustees to raise money by sale or otherwise, and to pay certain legacies; and wills the overplus or reversion thereof to be applied by them and the officiating ministers of the congregation or assembly of people called Methodists, that do and shall actually assemble at L. shall from time to time think fit to apply the same; and directs that when two or more trustees die, the survivors shall nominate others. Held, the legal estate is in the trustees, and a court of law will not inquire into the trust, which may be to charitable uses or otherwise, and is not void at law within 9 Geo. II, c. 36, s. 1. *Doe, d. Tpone, v. Copestake*, 2 Smith, 495; 6 East, 328.

5. Devise to a trustee to pay the rents to daughters (one a feme covert.) The use is not executed in the daughters. *Robinson v. Grey*, 9 East, 1.

6. Devise to A. in trust to permit and suffer the testator's widow to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all interests of monies in the funds and rents and profits arising from the testator's houses for her natural life, if she should remain unmarried; and that her receipts for all rents, &c. with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed, besides board and lodging to one of the annuitants; and that his children should be solely under their mother's direction until marriage, or properly provided for;—the use is executed in the devisees in trust. *Gregory v. Henderson*, 4 Taunt. 772.

V. RELATIVE TO SATISFIED TRUSTS.

(a) *Properties of.*

Wherever it appears that a satisfied term is still outstanding, and not assigned to the owner of the inheritance, he cannot sue at law for the premises, by ejectment or otherwise. *Goodtitle, ex dem. Jones, v. Jones*, 7 T. R. 43.

(b) *Who entitled to the beneficial interest therein.*

A satisfied trust shall be taken to be a trust for the benefit of the heir at law. *Doe*, ex dem. *Bristow*, v. *Pegge*, 1 T. R. 760, n.

VI. RELATIVE TO THE SURRENDER OF TRUSTS.

(a) *Presumption of.*(a 1) *General rules.*

1. In ejectment the jury will be directed to presume the surrender of a satisfied term. *Secus*, one unsatisfied. *Doe*, ex dem. *Hodsdon*, v. *Staple*, 2 T. R. 684; *Doe*, ex dem. *Bowerman*, v. *Sybourn*, 7 T. R. 2.

2. A surrender will be presumed if the beneficial occupation of the estate by the possessor may have induced a supposition that a conveyance of the legal estate has been made to the party beneficially interested; or when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance. *England* v. *Slade*, 4 T. R. 682.

3. The surrender of a term cannot be presumed under twenty years, without circumstances. *Doe*, ex dem. *Brandon*, v. *Calvert*, 5 Taunt. 170. Possession of the deed, and non-payment of interest, are not circumstances in aid of the presumption. *Ibid*.

4. A surrender will not be presumed if it be a breach of trust. *Keane* v. *Deardon*, 8 East, 248.

5. A surrender will not be presumed where the title of the party for whom the presumption is required is a doubtful equity only, until a court of equity has first declared in favour of the equitable title. *Keane* v. *Deardon*, 8 East, 248.

(a 2) *Examples.*

1. If a lease be granted to the *cestuy que trust* of a lease, in consideration, as the grant states, of the surrender of the former lease; there is evidence whence a jury may presume that the former lease was duly surrendered by the trustee. *Doe*, ex dem. *Blake*, v. *Luston*, 6 T. R. 289.

2. Where neither justice, nor the interest of the owner of the inheritance, are to be answered by presuming the surrender of a mortgage term, it cannot be presumed, from a sum having been appropriated by the marriage settlement of a

former owner to discharge it, against the express recognition of a subsequent owner of its existence, and conveyance by him as a security. *Doe*, ex dem. *Graham*, v. *Scott*, 11 East, 478.

VII. RELATIVE TO THE ABUSE OF TRUSTS.

(a) *Rights arising out of.*

An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. *Taylor* v. *Sir Thomas Pheme*, 3 M. & S. 574.

VIII. RELATIVE TO THE NOTICE OF TRUSTS BY COURTS OF LAW.

A court of law will take notice of a trust, and consider who is beneficially interested. *Winck* v. *Keeley*, 1 T. R. 619.

IX. RELATIVE TO TRUSTEES FOR PRIVATE PURPOSES.

(a) *Nature of their interest.*

1. Where there were no trusts to execute, and words of trust in the will, held that devisees in fee, subject, &c. took the ultimate remainder to their own use. *Smith*, ex dem. *Dennison*, v. *King*, 16 East, 283.

2. Devise of a renewable leasehold to A, for his own use and benefit, on his attaining twenty-one, upon trust that devisor's trustees should pay rent, perform covenants, and renew from time to time, and for that purpose make, surrender, &c. The trustees take the legal interest until A. reaches twenty-one, and not a mere naked power. *Goodright*, ex dem. *Revell*, v. *Parker*, 1 M. & S. 692.

3. The testator devised certain lands, part mortgaged in fee, and part unincumbered, to trustees and their heirs, to pay debts in aid of the personal estate, and devised the surplus and all his other lands, &c. to his first and other sons successively for life, with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life, with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male, with like remainders to his daughter for life, to trustees, &c. and to her first and other sons successively in tail male; with a proviso that each of the testator's sons, as he came into possession, might from time to time grant or appoint

all or any part of the lands whereof he should be so seised and possessed, to trustees, on trust, by the rents and profits to pay a jointure to any wife, &c. for the term of each such wife's natural life only. There were also powers by deeds to charge the lands with younger children's portions, and to lease for twenty-one years. While the mortgages remained outstanding, and the trusts for payment of debts unperformed, the eldest son by deed reciting the will and power, conveyed lands to trustees and their heirs on trust, by the rents and profits to raise and pay a jointure to his wife, during her natural life only; and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment against the settler and testator during the wife's life. K. B. held that trustees took a fee. C. B. held that they took no legal estate. *Wykham v. Wykham*, 11 East, 458; 3 Taunt. 316.

(b) *Duration of their interest.*

1. If an estate is devised to trustees during the life of A, the wife of B, in trust to pay the rents to C, during B's life-time, and on his death in case A. shall be then living, in trust to pay them to A. and C, and after the deaths of A. and C. without issue, then over to D. in fee; whereby there is no declaration of trust for the remainder of B's life, in the event of A. and C. dying before him without issue; yet if the intention manifestly appears to have been only to secure the rents to C. for his life, and to A. in case of her surviving B, the trust estate will be considered as determined on the death of A. and C. without issue, so that the fee will immediately vest in D, who by himself therefore may make a tenant to the *præcipe* for suffering a recovery. *Horton v. Whittaker*, 1 T. R. 346.

2. An express devise in fee to trustees may be cut down to an estate for life, upon an implication of intent. *Doe, ex dem. Compere, v. Hicks*, 7 T. R. 433.

3. Where an estate was devised to trustees and their heirs to preserve contingent remainders; and there were several sets of limitations, each of an estate for life and in tail, the trustees to permit the tenants for life to receive the rents; and between each set of limitations the estate was limited again to the trustees and their

heirs; held, that they took the legal interest only during the life estates. *Doe, ex dem. Compere, v. Hicks*, 7 T. R. 433.

4. Where the purposes of a trust may be answered by giving the trustees a less estate than a fee, no greater estate shall arise to them by implication; but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. *Doe, d. White, v. Simpson*, 5 East, 162; 1 Smith, 383.

5. A testator having an estate settled on himself for life, remainder in trust to secure 500*l.* a year to his wife, in lieu of dower; remainder to trustees for 200 years, for better securing the annuity; remainder to himself in fee; gives 200*l.* a year to his wife, in addition to her jointure, his just debts being previously paid; and appoints three persons "as trustees of inheritance for the execution hereof." The trustees take an estate in fee in remainder, subject to the term of 200 years. *Trent v. Hanning*, 3 Smith, 69; 7 East, 97.

6. Conveyance by deed to A, his heirs and assigns, during the life of B, in trust to pay the rents and profits as B. should appoint, during her life; and after her decease to the use of such child or children, &c. and in such shares as B. should appoint, &c. The trustees only take during B's life. *Blaker v. Anscombe*, 1 N. R. 25.

(c) *Of his right to release suits brought in his name.*

A trustee lending his name as plaintiff is not permitted to release the action without leave of the court. *Hickey v. Burt*, 7 Taunt. 48.

X. RELATIVE TO THE CESTUY QUE TRUST.

(a) *Nature of his interest.*

If a bond be given by C. to A. in trust for B, in an action on the bond by A, C. may set off a debt due from B, though the trust does not appear on the face of the instrument. *Bottomley v. Brooke*, 1 T. R. 621; *Rudge v. Birch*, Id. 622.

(b) *Duration of his interest.*

A devise in fee to trustees, without any specific limitation to *cestuy que trust*, gives him a fee. *Challenger v. Shepherd*, 8 T. R. 597.

(c) *Adverse possession by, what considered as.*

The possession and receipt of the rent, issues, and profits of a trust estate, by a *cestui que* trust for more than twenty years after the creation of the trust, without any interference of the trustees, when such possession, &c. is consistent with, and secured to the *cestui que* trust by the terms of the trust deed, is not adverse to the title of the trustees so as to bar their ejectment against the grantees of the *cestui que* trust brought after the twenty years. *Keane v. Deardon*, 8 East, 243.

(d) *Privileges of.*(d 1) *In relation to his trustee.*

1. The doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que* trust; *Holdfast*, d. *Wool-lams*, v. *Clapham*, 1 T. R. 600; *Doe*, d. *Estwick*, v. *Way*, 1 T. R. 735; *Doe*, d. *Bristow*, v. *Pegge*, 1 T. R. 760, n; has been solemnly repudiated. *Weakly*, d. *Rea*, v. *Rogers*, 5 East, 138, n; *Roe*, d. *Reade*, v. *Reade*, 8 T. R. 118.

2. The legislature, in passing the stat. 1 Rich. III, c. 1, only intended that where a person having an estate in possession, conveyed it to a trustee to his own use, and afterwards conveyed it away to a purchaser, he should not set up the estate in his trustee against the purchaser. *Good-title*, ex dem. *Jones*, v. *Jones*, 7 T. R. 43.

3. *Semble*, that a *bond fide* lease made by an equitable tenant in tail, will prevent the trustees in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred. *Roe*, d. *Eberall*, v. *Lowe*, 1 H. Bl. 446. But see the decisions cited in the note at the end of the case.

XI. RELATIVE TO TRUSTEES FOR PUBLIC PURPOSES.

(a) *Responsibility of, for private injuries or demands.*

1. It seems that no action lies against commissioners (or their servants) appointed under an act of parliament to effectuate its provisions, unless they exceed their jurisdiction; and clearly not, where the act gives another remedy. *The Governor and Company of Cast Plate Manufacturers* v. *Meredith*, 4 T. R. 794.

2. Where an act directs that monies recovered against commissioners for any thing done under it, shall be defrayed out of the money in the hands of their treasurer, they are nevertheless personally liable in the first instance. *Rex v. Kingston*, 8 East, 41.

3. Trustees appointed under a turnpike act, with authority to cut drains in lands, making reasonable satisfaction to the owners thereof, are not liable to the actions of third persons thereby injured, if they acted to the best of their skill, and with the best advice. *Sutton v. Clarke*, 1 Mars. 429; 6 Taunt. 29.

4. The trustees of a certain public road are empowered by statute, and required, "from time to time to cause such and so many lamp-irons or lamp-posts to be put along the sides of the said road, or upon the wall or palisade of any house, &c. as they shall think proper; and also to cause such number of lamps to be provided as they should think necessary for lighting the said road." Under their directions the road is cleansed, and the scrapings brought to the side of the road. No lamps are placed by the road side, in consequence of which a passenger falls over the scrapings and breaks her arm. Held, that the trustees were not liable. The ground for charging them was, that they had neglected their duty in omitting to provide lamps. The ground of the judgment was, as it seems, two-fold:—1. The statute left it for them to determine whether any lamps were requisite:—2. The trustees of a public road are only punishable by indictment for a neglect of their duty, not by action. *Harris v. Baker*, 4 M. & S. 27.

(b) *Responsibility of, for the acts of their agents.*

1. It seems that the trustees of a public road, who in furtherance thereof employ others under them, are not to be considered in the same light as are private individuals retaining others. Therefore they are not answerable for their misconduct. *Harris v. Baker*, 4 M. & S. 27.

2. The trustees of a certain public road were empowered to make contracts for the cleansing the said road. They engage with a contractor; and the labourers employed by him, do the work so negligently as to injure a passenger. The trustees are not liable, since the labourers cannot

(as the lime-burner's servant, in *Bush v. Steinman*, 1 Bos. & Pul. 404, might) be considered as in their employment. No duty was imposed upon the trustees to see that the labourers did not commit any nuisance. *Harris v. Baker*, 4 M. & S. 27.

(c) *Responsibility of,—whether joint or several.*

By a turnpike act trustees are appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owners thereof. A drain is cut by an order, signed by a competent number of trustees, and according to the plan of a surveyor, in land adjoining the plaintiffs, by which the latter is overflowed. An action is brought against one of the trustees, and held well. *Sutton v. Clarke*, 1 Mars. 429; 6 Taunt. 436.

(d) *Treasurer of, suits against.*

(d 1) *Where the injurious act is that of some of the trustees only.*

Where a turnpike act directed that actions for acts of the trustees should be brought against the treasurer; held, that the latter could not be sued for the act of fewer than all the trustees. *Everett v. Cooch*, 7 Taunt. 1.

TURNPIKE.—(See TOLLS; TRUST.)

I. RELATIVE TO TOLLS.

(a) *On carriages travelling for hire.*

(a 1) *A stage coach, whether considered as, p. 961.*

(b) *Exemption from.*

(b 1) *On repassing with different horses, p. 961.*

II. RELATIVE TO THE POWER OF THE TRUSTEES OF.

(a) *To lease the toll-houses, under a power to lease the tolls, p. 961.*

III. OF ACTIONS FOR PENALTIES UNDER THE GENERAL TURNPIKE ACT.

(a) *Motion to stay proceedings, where made, p. 961.*

I. RELATIVE TO TOLLS.

(a) *On carriages travelling for hire.*

(a 1) *A stage coach, whether considered as.*

A stage coach is not "a carriage travelling for hire," within the meaning of a turnpike act, providing that the traveller or passenger in a carriage travelling for hire shall be considered as the person paying the toll, and that such payment shall not exempt such carriage re-passing with a different traveller or passenger. *Williams v. Sangar*, 10 East, 66.

(b) *Exemption from.*

(b 1) *On re-passing with different horses.*

An exemption in a turnpike act from toll on passing again with the same carriage, applies, though with different horses, being the same in number. *Williams v. Sangar*, 10 East, 66.

II. RELATIVE TO THE POWER OF THE TRUSTEES OF.

(a) *To lease the toll-houses under a power to lease the tolls.*

A public turnpike act, empowering trustees to erect toll-houses and lease the tolls, to persons advancing money thereon, with a proviso that there shall be no priority amongst different mortgagees, does not authorize them to lease the toll-house, since then one creditor would gain a preference over another. *Fairtitle, ex dem. Mytton, v. Gilbert*, 2 T. R. 169.

III. OF ACTIONS FOR PENALTIES UNDER THE GENERAL TURNPIKE ACT.

(a) *Motion to stay proceedings, where made.*

Must be made in bank. *Robinson v. Pocock*, 11 East, 484.

UNIVERSITY.

I. STATUTES OF.

(a) *Exclusive jurisdiction in their interpretation, p. 962.*

II. RIGHTS OF.

(a) *To copies of publications.*

(a 1) *Entry at Stationers Hall, —whether essential to, p. 962.*

I. STATUTES OF.

- (a) *Exclusive jurisdiction in their interpretation.*

The interpretation put by the Universities upon their own statutes, is conclusive. *Rex v. The Chancellor, &c. of the University of Cambridge*, 6 T. R. 89.

II. RIGHTS OF.

- (a) *To copies of publications.*
(a 1) *Entry at Stationers Hall,—whether essential to.*

No. *University, &c. of Cambridge v. Bryer*, 16 East, 317.

USE AND OCCUPATION, (Action for.)

I. AGAINST WHOM MAINTAINABLE.

- (a) *Tenant or sub-lessee*, p. 962.

II. IN RELATION TO PREVIOUS MATTERS.

- (a) *A previous surrender*, p. 962.
(b) *A previous ejectment*, p. 962.
(c) *A previous destruction of the premises by fire*, p. 962.
(d) *A holding over after notice*, p. 962.

III. OF THE DECLARATION.

- (a) *Whether special or general*, p. 962.
(b) *Local description in*, p. 962.

IV. EVIDENCE IN.

- (a) *Proof of title.*
(a 1) *From the defendant's acts on a previous ejectment*, p. 962.

I. AGAINST WHOM MAINTAINABLE.

- (a) *Tenant, or sub-lessee.*

An occupation by the tenant of the defendant, is, as far as respects the plaintiff in an action of use and occupation, under stat. 11 Geo. II, c. 19, an occupation by the defendant himself. *Bull v. Sibbo*, 8 T. R. 327.

II. IN RELATION TO PREVIOUS MATTERS.

- (a) *A previous surrender.*

A lessor, who accepts the key of, and

USE AND OCCUPATION, &c.

thenceforth holds the demised house, cannot recover against the tenant for the subsequent use, and occupation. *Whitehead v. Clifford*, 5 Taunt. 518.

- (b) *A previous ejectment.*

After a recovery against a tenant in ejectment, landlord cannot maintain use and occupation for a period subsequent to the day of the demise in the declaration on which he has recovered. But he may, for a period antecedent to that day. *Birch v. Wright*, 1 T. R. 378.

- (c) *A previous destruction of the premises by fire.*

Is no defence to an action as for subsequent use and occupation. *Baker v. Holpzauffell*, 4 Taunt. 45.

- (d) *A holding over after notice.*

If lessee hold over, after notice from landlord, that in case of holding over beyond the day in the notice, he shall pay an increased rent; the holding over is an assent to the new rent, and the landlord shall recover it in an action for use and occupation. *Lofft*. 153.

III. OF THE DECLARATION.

- (a) *Whether special or general.*

Action of debt may be general, without detailing the particulars of the contract. *Wilkins v. Wingate*, 6 T. R. 62.

- (b) *Local description in.*

Neither the parish nor county, in which the premises lie, need be stated. *Kirtland v. Pounsett*, 1 Taunt. 570; *Egler v. Marsden*, 5 Taunt. 25; *Rex v. Fraser*, 6 East, 348; 2 Smith, 462.

IV. EVIDENCE IN.

- (a) *Proof of title.*

- (a 1) *From the defendant's acts on a previous ejectment.*

Where a defendant takes possession of premises, on the death of a former tenant, and an action of ejectment is brought against him without giving notice to quit; if to defend himself from that action, he produces a letter from the plaintiff, treating him as tenant, and claiming rent, that will be conclusive evidence of his tenancy to the plaintiff, in an action for use and occupation, though he alleged that

he produced it only for the purpose of shewing that he was tenant in possession. *Townsend v. Davis*, Forrest, 120.

USURY.

I. CRITERION OF, p. 963.

II. JURISDICTION IN QUESTIONS OF.

- (a) *Whether belonging to the court or jury*, p. 963.

III. WHAT CONTRACTS ARE USURIOUS.

- (a) *On a discounting*, p. 963.
 (b) *Contracts for commission*, p. 964.
 (c) *Though the principal is in hazard*, p. 964.
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IV. WHAT CONTRACTS ARE NOT USURIOUS.

- (a) *On a discounting*, p. 964.
 (b) *Contracts for commission*, p. 964.
 (c) *Where the principal is in hazard*, p. 964.
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V. RELATIVE TO CONTRACTS RESPECTING PROPERTY IN IRELAND AND THE WEST INDIES, p. 965.

VI. ITS EFFECT ON EXISTING DEMANDS, p. 965.

VII. ITS EFFECT ON COLLATERAL OR SUBSEQUENT CONTRACTS.

- (a) *General rules*, p. 965.
 (b) *Miscellaneous cases*, p. 966.

VIII. ITS EFFECT ON BILLS OR NOTES NEGOTIATED, p. 966.

IX. RELATIVE TO THE PENALTIES OF USURY.

- (a) *How incurred*, p. 966.
 (b) *Action for*.
 (b 1) *Whether commenced in time*, p. 966.
 (b 2) *Venue in*, p. 966.
 (b 3) *Amendment in*, p. 966.

X. PLEA OF.

- (a) *Whether general or special*, p. 966.

XI. RELATIVE TO RELIEF FROM.

- (a) *Whether granted where the payments have been of legal interest only*, p. 966.
 (b) *Preliminaries to*, p. 967.

I. CRITERION OF.

1. If an agreement be not usurious when concluded, no after-event can make it so. *Tate v. Wellings*, 3 T. R. 539.

2. Where the object of a contract is borrowing and lending of money, at more than the legal interest, no shift, colour, or contrivance will take the agreement out of the statute. But if the substance be a sale, or other fair transaction, and the party buying may pay whenever he pleases, at a fair price, and has credit given him in the course of trade; but if he does not pay within the time, then he is to pay an advanced sum of so much *per cent*: This will not be usury, because it is contingent, and in the nature of a penalty for the delay, and a compensation for the risk. *Floyer v. Edwards*, Loft, 595.

II. JURISDICTION IN QUESTIONS OF.

- (a) *Whether belonging to the court or jury*.

Whether an allowance of commission, accompanying a loan of interest, exceeds a fair and reasonable compensation for the trouble of the lender, under the circumstances in question, is for the jury to determine. And, if their determination be not manifestly erroneous, the court, though they may doubt its propriety, will not set it aside and grant a new trial. *Carstairs v. Stein*, 4 M. & S. 190.

III. WHAT CONTRACTS ARE USURIOUS.

- (a) *On a discounting*.

1. An agreement on discounting a bill, that another bill not due should be taken in part payment as cash, is usurious, though the full discount was taken. *Parr v. Eliason*, 1 East, 92.

2. The grantor of an annuity having agreed with the grantee to redeem, drew a bill for 5,000 *l.* at three years, which the grantee discounted thus:—he took

4,083*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* in cash, and took 750*l.* as interest for three years upon 5,000*l.* Held usurious. *Marsh v. Martindale*, 3 B. & P. 154.

(b) *Contracts for commission.*

In every case where an allowance of commission accompanies a loan of money, so much of it as may fairly be considered a compensation for the lender's trouble about the business in question, must be considered as commission; but the excess beyond that must be considered as interest upon the loan; so that if with this addition, the total interest exceeds the legal rate, the loan is usurious. The motive to give the excess beyond a reasonable commission, could not be to compensate the lender for his services; the only motive therefore, was, to induce him to lend the money. *Carstairs v. Stein*, 4 M. & S. 192.

(c) *Though the principal is in hazard.*

Where more than five per cent. is taken, if the substance of the contract be a borrowing and lending, a slight colourable contingency only will not make it legal. *Richards v. Brown*, Cowp. 770.

(d) *Miscellaneous cases.*

1. If there is an agreement to pay legal interest, and a premium is paid down over and above the interest, the agreement is usurious and void. *Fisher v. Beasley*, Dougl. 235.

2. When upon a negotiation for a loan of money, the lender says he cannot advance the money, but will furnish goods, which the other takes and sells; if the security given is for a sum of money made payable at a future day, greatly exceeding the value of the goods, and five per cent. interest, this is an usurious loan, and the security and contract are both void. *Lowe v. Waller*, Dougl. 736.

3. There is reserved on a loan of money, besides interest at five per cent., a proportion of the expected profits of a trade, but in the losses of which the lender is not to bear a part. Held, that the loan was usurious. *Morse v. Wilson*, 4 T. R. 353.

4. Where a person having discounted a bill for the drawer at five per cent. discount, took an additional sum for guaran-

teeing the payment of the bill by the acceptor, there being no doubt of the acceptor's solvency; the jury found that this was a cover for usury. *Lee v. Cass*, 1 Taunt. 511.

IV. WHAT CONTRACTS ARE NOT USURIOUS.

(a) *On a discounting.*

1. Where the acceptor of a bill took a premium of sixpence in the pound from the indorsee, for payment of the bill a fortnight before it became due, held no usury. *Barclay v. Walmsley*, 4 East, 55.

2. Where the discount of a bill, instead of money, gives the holder other bills which have time to run, and makes no rebate for this, he is not necessarily guilty of usury. *Hammet v. Yea*, 1 B. & P. 144.

(b) *By contracts for commission.*

1. It is not usurious in a country banker to take, on discounting a bill, over and above 5*l.* per cent. for the time the bill has to run, a farther sum of 5*s.* on the gross sum for commission, if warranted by usage. *Winch v. Fenn*, 2 T. R. 52, n. (c)

2. Where an agent advances money for his principal, he may lawfully take an extra sum or allowance for his trouble and attention, in addition to the legal interest, on the money advanced. What this sum shall be must be altogether a question for the jury, depending upon the peculiar circumstances of the case, the degree of trouble incurred, and the particular custom of trade. And, unless the jury find that the commission was a cover for usury, the court cannot intend that it is so, if it appear that there really was any substantive trouble upon which a compensation might be claimed. *Palmer v. Baker*, 1 M. & S. 56; *Carstairs v. Stein*, 4 M. & S. 192.

(c) *Where the principal is in hazard.*

Where the principal is in hazard, as in bottomry bonds, a reservation of more than 5*l.* interest is legal; *secus*, where the principal is secured at all events. *Morse v. Wilson*, 4 T. R. 356.

(d) *Miscellaneous cases.*

1. The purchase of an annuity for the life of the vendor (thirty-two years of age) at six years' purchase, is not usurious, notwithstanding it is made redeemable, at the option of the vendor, at the end of five

years and a half purchase, and by mistake of the scrivener, is styled a loan in the recital of the deeds. *Murray v. Harding*, 2 Blk. 859; 3 Wils. 390.

2. One sells goods at three months credit, but stipulates that in case the money is unpaid that the vendee shall allow him a halfpenny an ounce per month till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but above the legal rate of interest. The contract being *bond fide*, the sale is not usurious. *Floyer v. Edwards*, Cowp. 112.

3. A. agreed with B. to lend him money, to be raised by the sale of stock, on the following terms:—The stock was to be replaced by a given day; but if not, the sum to be repaid on a subsequent day—interest equal to the dividends which the stock would have produced. Held, that the agreement, being *bond fide* and not a devise to obtain more than legal interest, was not usurious, though such interest exceeded 5*l.* per cent. *Tate v. Wellings*, 3 T. R. 531.

4. An indorsement on a bond conditioned for payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5 per cent. that at the end of each year the year's interest due is to be added to the principal, and then the 20*l.*, received during the year, is to be deducted, and the balance remain as principal, does not make the transaction usurious, since the year's interest due, must be taken to mean *legally* due. Lord Kenyon, C. J. diss. *Le Grange v. Hamilton*, 4 T. R. 613; 5 T. R. 367; 2 K. B. 144.

5. The defendant was indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which the plaintiff had sued him; but being unable to pay it, he agreed, that in consideration that the plaintiff would forbear his action, till the 19th Nov. 1804, upon the defendant's giving him a bond to transfer to him, on 19th Nov. 1804, so much stock as said sum would purchase at the then present day's price, which would amount to 908*l.* 16*s.* 7*d.*, "together with such interest as the same would have produced as such stock" in the mean time. Held not usurious. *Maddock v. Rumball*, 8 East, 304.

6. Where the plaintiffs had made advances to the defendant, and credited him with 25,000*l.*, at a time when the 3 per

cents were at 50; in consideration of which, afterwards, in October, when the 3 per cents were at 51½, he undertook to purchase the sum of 50,000*l.* in their names, and to account for the dividends therein from Midsummer-day then last; held not usurious. *Boldero v. Jackson*, 11 East, 612.

7. An extorting *post obit*, however gross, cannot be considered as usury. *Matthews v. Laws*, 1 Anst. 7.

8. A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance a principal to carry interest to the next quarter, is not usury. *Calliot v. Walker*, 2 Anst. 495.

9. An agreement to pay 12*l.* per cent. on the amount of the purchase-money, is not usurious, though there be a covenant to keep the vessel insured, and that the plaintiff shall be entitled to his share of the money, to be recovered from the underwriters. *Grigg v. Stoker*, Forrest. 4.

V. RELATIVE TO CONTRACTS RESPECTING PROPERTY IN IRELAND AND THE WEST INDIES.

The stat. 14 Geo. III, c. 79, which enacts that mortgages and other securities respecting *lands* in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England, does not extend to *personal* contracts. *Dewar v. Span*, 3 T. R. 425.

VI. ITS EFFECT ON EXISTING DEMANDS.

A prior legal debt is not destroyed by a subsequent usurious contract relating to it. *Gray v. Fowler*, 1 H. Bl. 462.

VII. ITS EFFECT ON COLLATERAL OR SUBSEQUENT CONTRACTS.

(a) General rules.

1. If one bond be given in lieu of another void from usury, the second bond is also void. *Tate v. Wellings*, 3 T. R. 531.

2. If money is lent at usurious interest, a subsequent contract that all usurious interest should be struck off, and the principal repaid with legal interest, is valid. *Barnes v. Hedley*, 2 Taunt. 184.

3. A fresh security given for the balance of a debt originally usurious, is

so likewise. *Pickering v. Banks*, Forest. 72.

(b) *Miscellaneous cases.*

1. Where A., for an usurious consideration, had given his promissory note to B., who transferred it to C. for a valuable consideration, without any notice of the usury, and A. afterwards gave his bond to C. for the amount of the note; held, that this bond was not vitiated by the original usury to which C. was no party. *Cuthbert v. Haley*, 8 T. R. 390.

2. Where a person, in order to get his acceptances negotiated, agrees with a broker to allow him to retain exorbitant brokerage out of the money received upon getting them discounted, the broker himself not being the party to discount them, a bill accepted and negotiated upon such agreement is not therefore void. *Dagnall v. Wigley*, 11 East, 43.

3. A. being indebted to B. for different usurious loans, applies to B. for a further advance, which B. agrees to make at the legal rate of interest, provided A.'s father will give his security for it, and also for part of the previous debt. A.'s father consents, and accepts three bills, the two first of which exactly cover the amount of the legal debt. The first is paid when due. In an action on the second, held that the acceptances having been given partly as a security for an illegal debt, were all tainted with the illegality, and were therefore void. *Harrison v. Hannel*, 1 Mars. 349; 5 Taunt. 780.

VIII. ITS EFFECT ON BILLS OR NOTES NEGOTIATED.

A bill of exchange given upon an usurious contract, is void in the hands of a *bond fide* holder for valuable consideration without notice. *Lowe v. Waller*, Dougl. 736.

IX. RELATIVE TO THE PENALTIES OF USURY.

(a) *How incurred.*

1. To the offence of usury two things are requisite; 1. a usurious contract; 2. and an acceptance of usurious interest in pursuance of that contract. *Scott v. Brest*, 2 T. R. 238; *Fisher v. Beasley*, Dougl. 235; *Maddock v. Hammett*, 7 T. R. 184.

2. Where A. had borrowed 600 l. of B; paying him ten guineas premium; and at the end of the half year A. paid 15 l. for

interest; held that the usury was complete. *Wade v. Wilson*, 1 East, 195.

(b) *Action for.*

(b 1) *Whether commenced in time.*

1. If one lends a sum of 100 l. and takes 6 l. 5 s. for interest thereon for three months, by way of advance at the time of lending, the penalty is that instant incurred, and the action must be brought within a year next after that time. *Loyd v. Williams*, 3 Wils. 250; 2 Blk. 792.

2. Where A. lent B. 500 l., paying immediately a premium of 50 l., and paying interest on the 500 l. at five per cent. for five years, at the end of which time, a *qui tam* action was brought; held that it was in time. *Scurry v. Freeman*, 2 B. & P. 381.

3. See *Hodges v. Lowat*, Lofft. 50.

(b 2) *Venue in.*

1. If, under an usurious contract, the lender is to receive the rents of premises belonging to the borrower, and retain the usurious interest out of them, whereupon he receives the rents in one county, and accounts and pays over the surplus in another, the venue in an action for usury, is properly laid in the latter county. *Scott v. Brest*, 2 T. R. 238.

2. Where a draft was given with usurious interest, and a receipt taken for it in the county of A., and the draft was afterwards exchanged for money in the county of B.; the venue is properly laid in B. *Scurry v. Freeman*, 2 B. & P. 281.

(b 3) *Amendment in.*

Sums and dates not amendable after the time of limitation has expired. Dougl. 114, n.

X. PLEA OF.

(a) *Whether general or special.*

Must be special. *Hill v. Montagu*, 2 M. & S. 377; *Nicholl v. Lee*, 3 Anat. 940.

XI. RELATIVE TO RELIEF FROM.

(a) *Whether granted where the payments have been of legal interest only.*

If a person pays to the extent of principal and interest on an usurious contract, or money fairly lost at play, the payment cannot be recovered back. 2 Burr. 1012.

(b) *Preliminaries to.*

The rule that where parties are in *pari delicto potior est conditio possidentis*, applies to the lender, though not to the borrower under a usurious contract. The borrower therefore may have relief from the contract, by action or motion, as the case may require; but since this is upon equitable grounds, the maxim, that a party who seeks equity must do equity applies; therefore, before suing he must place the defendant in his original situation, as by tendering back to him the money really advanced, with legal interest. *Fitzroy v. Guillim*, 1 T. R. 153; *Alexander v. Owen*, Id. 225; *Hindle v. O'Brien*, 1 Taunt. 413.

VAGRANT.

I. RELATIVE TO THE CONVICTION OF.

- (a) *Form of the adjudication of employment in his Majesty's service*, p. 967.

II. RELATIVE TO THE COMMITMENT OF AND AS.

- (a) *For deserting his family,—its form*, p. 967.
(b) *Under 23 Geo. III, c. 8,—form* p. 967.

I. RELATIVE TO THE CONVICTION OF.

- (a) *Form of the adjudication of employment in his Majesty's service.*

Must specify whether by sea or land. *Rex v. Patchett*, 5 East, 339.

II. RELATIVE TO THE COMMITMENT OF AND AS.

- (a) *For deserting his family,—its form.*
Must state that they were chargeable, and be for a limited time. *Rex v. Hall*, 3 Burr. 1636.

- (b) *Under 23 Geo. III, c. 88,—form of.*

Must (in execution) state that the implements were found upon them, when apprehended. *Rex v. Brown*, 8 T. R. 26.

VARIANCE.

I. OF CERTAIN GENERAL RULES.

- (a) *Of variance arising from the acceptation of words in their popular sense*, p. 970.

- (b) *Of variance arising from blending immaterial with material averments*, p. 970.
(c) *Of variance arising from using the term "aforesaid,"* p. 970.
(d) *Of avoiding a variance by using a videlicet*, p. 970.
(e) *Of avoiding a variance, by rejecting an averment as surplusage*, p. 970.

II. OF VARIANCE IN THE DESCRIPTION OF CONTRACTS AND WRITTEN INSTRUMENTS.

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- (a 1) *Reason of the doctrine of variance*, p. 970.

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I. OF CERTAIN GENERAL RULES.

(a) *Of variance arising from the acceptance of words in their popular sense.*

Words will be so received. Hence "bushel" simply means Winchester measure. *Hockin v. Cooke*, 4 T. R. 314.

(b) *Of variance, arising from blending immaterial with material averments.*

The former is made material by connecting with and making the latter dependant on it. *Peppin v. Solomons*, 5 T. R. 496.

(c) *Of variance, arising from using the term "aforesaid."*

The term binds to an exact recital. *Boyce v. Whitaker*, Dougl. 97.

(d) *Of avoiding a variance by using a videlicet.*

Is avoided where the manner of the averment is immaterial. *Rex v. Aylett*, 1 T. R. 63. *Secus*, where there is no videlicet. *Symmons v. Knox*, 3 T. R. 65; *Durston v. Tatham*, Id. 67; *Arnfield v. Bate*, 3 M. & S. 173. And *secus* where, though employed, the manner is material. *Green v. Rennett*, 1 T. R. 656; *White v. Wilson*, 2 B. & P. 116.

(e) *Of avoiding a variance by rejecting an averment as surplusage.*

If no averment whatever was requisite, being surplusage, the variance is immaterial. *Secus*, where some was requisite. *Bristow v. Wright*, Dougl. 667; *King v. Pippet*, 1 T. R. 235; *Pitt v. Green*, 9 East, 188; *Hoar v. Mill*, 4 M. & S. 470. And though held that describing a deed as obliging the covenantor and his executors, whereas the obligation was for his heirs as well, was no variance. *Hamborough v. Wilkie*, 4 M. & S. 474, n. Yet this is questioned in *Hoar v. Mill*, supra.

II. OF VARIANCE IN THE DESCRIPTION OF CONTRACTS AND WRITTEN INSTRUMENTS.

(a) *General rules.*

(a 1) *Reason of the doctrine of variance.*

Because the subject is, 1. Matter of description. *Drewry v. Twiss*, 4 T. R. 560; 2. Entire. *Gwinet v. Phillips*, 3 T. R. 643.

(a 2) *Rule as to the extent of the description.*

1. In declaring on a simple contract, every term thereof must be stated, which might, in fair presumption, have induced the defendant to make the promise. *Leeds v. Burrows*, 12 East, 1. See 4 Taunt. 285.

2. In pleading a contract the party need not disclose the whole extent to which it entitles him, but only that part of it by which the right he insists on was conferred. *Churchill v. Wilkins*, 1 T. R. 449; *Clarke v. Gray*, 6 East, 563; *Miles v. Sheward*, 8 East, 7; *Tempest v. Rawling*, 13 East, 18; *Baptiste v. Cobbold*, 1 B. & P. 7.

(a 3) *Of a description according to the legal effect.*

Is sufficient. Dougl. 667.

(a 4) *Rule,—where the beneficial interest is in a third person.*

An agreement to deliver goods to A. (the consideration of a promise by A.) cannot be described as an agreement to deliver to B, though there be a connection between A. and B. with reference to the transaction; unless it can be shewn that they were to be so delivered on behalf of B. *Leery v. Goodson*, 4 T. R. 687.

(a 5) *Of variance arising from using the term "tenor."*

The variation of a letter is in such case fatal. *King v. Pippet*, 1 T. R. 235. But "received" for receiv'd is not a variance. *Hart's case*, 4 T. R. 166.

(a 6) (a 7) (a 8). See the Analysis.

(a 9) *Of variance arising from mutilating a word.*

Where a word is misrecited and mutilated, and the party has bound himself to a literal recital, it is fatal, if the mutilated word is itself a word, though it do

not make sense with the context; but not if it is not a word. *Rex v. Beech*, Cowp. 229; Dougl. 194, n. Loft. 785.

(a 10) *Of variance arising from the misdescription of facts, collateral to the contract.*

Is immaterial. Hence, proof that a ship stated in an action on a policy to have sailed *after*, sailed *before* the insurance, is sufficient. *Peppin v. Solomons*, 5 T. R. 496; or that a less sum than that averred has accrued due under a contract; a *reddendum* for instance. *Gwinnet v. Phillips*, 3 T. R. 643.

(b) *Of describing a qualified or conditional contract.*

Cannot be described as an absolute one. *Churchill v. Wilkins*, 1 T. R. 447. Hence, covenants absolute in their terms, but qualified by others, cannot be stated alone. And if they are, *semble*, objection may be taken under *non est factum*. *Howell v. Richards*, 11 East, 633.

(c) *Of describing an alternative contract.*

Cannot be described as an absolute one. *Tate v. Wellings*, 3 T. R. 531. Not even after election made. *Penny v. Porter*, 2 East, 2.

(d) *Of variance in names.*

In the case of a written instrument, is a ground of nonsuit; whether the variation be in the party's own. *Gordon v. Austin*, 4 T. R. 611; *Bingham v. Dickie*, 5 Taunt. 814; or a third person's name, *Whitwell v. Bennett*, 3 B. & P. 559; *Hutchinson v. Piper*, 4 Taunt. 810; *Le Sage v. Johnson*, Forrest. 23.

(e) *Of stating insensible matter.*

An insensible indorsement upon a contract need not be stated in declaring thereon. *Waley v. Pajot*, 2 B. & P. 51.

(f) *Of declaring on a contract where a joint contractor is dead.*

Must be on a contract by the deceased and survivors. *Spalding v. Mure*, 6 T. R. 363; *Bovill v. Wood*, 2 M. & S. 25.

(g) *Of describing a contract of sale.*

1. Vested interest is misdescribed as an expectancy. *Latham v. Barber*, 6 T. R. 67.

2. Where part payment is to be by goods of a fixed price, the whole consideration may be described as money paid. *Hands v. Burton*, 9 East, 349.

3. Weight expressed as "about" so much, may be described as of the ascertained amount. *Gladstone v. Neale*, 13 East, 410.

4. Price varying within certain limits may be described as "reasonable." *Laing v. Fidgeon*, 6 Taunt. 108.

5. The sale of the particular article sold with others at distinct prices, alone need be stated. *Cotterill v. Cuff*, 4 Taunt. 285.

6. Payment by bill at two months, on invoice or delivery, may, in suing for non-delivery, be described as by bill at two months. *Squier v. Hunt*, 3 Price, 68.

(h) *Of describing a warranty.*

1. The particular warranty, where there are several, alone need be stated. *Cotterill v. Cuff*, 4 Taunt. 285.

2. An exception subjoined to a general warranty, must be stated, though the want of the quality would not have been a breach of the warranty, if absolute. *Morris v. Lithgoe*, 2 Smith, 395.

3. In deceit, a warranty laid as joint, must be proved accordingly. *Weall v. King*, 12 East, 452.

(i) *Of describing a lease, and matters connected therewith.*

(i 1) *Variance avoided by using the term "premises."*

The demise of two messuages may be described as of a messuage and premises. *Taylor v. Brooke*, 3 M. & S. 169.

(i 2) *Of describing the situation of the demised premises.*

A *reddendum* as for land situated in one parish, instead of in two, is a misdescription. *Pool v. Court*, 4 Taunt. 700.

(i 3) *Of describing the reddendum in an avowry.*

The amount, though under a *videlicet*, must be proved as laid. *Brown v. Sayce*, 4 Taunt. 320.

(i 4) *Of describing the sum in arrears in an avowry.*

The description may exceed the truth. *Harrison v. Barnby*, 5 T. R. 246; *Forty*

v. *Imber*, 6 East 434; 2 Smith, 548; *supra*, I. (a 10).

- (i 5) *Of describing the implied obligation in actions for breach of good husbandry.*

When laid as the custom of the country, is established by proof of its being contrary to what, in those parts, is considered such. *Legh v. Hewitt*, 4 East, 154.

- (i 6) *Of describing the relation of an assignee of parcel.*

To describe him as assignee of all is a misdescription. *Hare v. Cator*, Cowp. 766.

- (i 7) *Of descriptions in actions for double rent.*

A lease from year to year is misdescribed as one for three years. *Shute v. Hornsey*, Dougl. 668. *Secus*, where the tenant has held during three years. *Birch v. Wright*, 1 T. R. 380.

- (i 8) *Of descriptions in actions for not leaving a year's rent on an execution.*

A circumstantial description of the demise must be proved as laid. *Bristow v. Wright*, Dougl. 665.

- (i 9) *Of describing the relation of a party let into possession, under an agreement for a lease.*

After payment of rent, may be described as a demise. *Tempest v. Rawling*, 13 East, 18.

- (i 10) *Miscellaneous cases.*

1. In an action of covenant on a lease of "the veins of coal under certain farms and lands therein described, situate in the parishes of B. and M., then in the several occupations of A. B. and C., with liberty to dig any pits, shafts, levels, *soughs*, &c. the declaration varied from the deed; 1. In stating that the land was set out by admeasurement instead of by reputation:—2. In changing the word *soughs* to *sloughs*:—3. In stating the lands to be situate in the parish of B. & M., instead of the parishes of B. & M.:—4. and in stating them to be in the occupation of A, B, and C, instead of in the several occupations of A, B, and C. Held, that the first and third variances were fatal; the second

and fourth immaterial. *Morgan v. Edwards*, 2 Mars. 96; 6 Taunt. 394.

2. Covenant to repair, "when and as need should require," adding, "and at furthest after notice," is misdescribed by omitting the addition. *Horsefall v. Testar*, 7 Taunt. 385; 1 Moore, 89.

- (k) *Of describing a building agreement, the period of which had been enlarged.*

Declaration on a building agreement under seal, for non-payment of the price of two houses, to be built by the 1st of April; issue on the averment, that they were built by that day; evidence that they were finished on a subsequent day, in pursuance of a parol agreement to enlarge the time. Held, that supposing the plaintiff was entitled to the sum demanded, yet that the contract had been misdescribed. *Littler v. Holland*, 3 T. R. 590.

- (l) *Of describing an agency del credere.*

To declare against one as indebted in respect of goods delivered to be disposed of, without stating the fact, that he was an agent under a commission *del credere*, is a misdescription. *Gall v. Comber*, 1 Moore, 279.

- (m) *Of describing a consignment.*

A, in London, consigns goods to B. at Bristol, to be disposed of for him by B.; and after they are shipped off, writes to B, inclosing the bill of lading, and requesting leave to draw on B. in about three months; to which B. replies "that the moment the goods arrive, A. might depend on hearing from him when he might draw upon him; or, that B. would send him a banker's draft." The goods arrive, and a bill at two months sight is presented to B, which he, being a creditor of A, refuses to accept. Held, 1. that the promise by B. to give notice to A. when A., might draw upon him, was an undertaking to accept the bill when drawn:—2. That the three months were to be reckoned from the date of the latter, and not from the arrival of the goods:—3. That the goods were to be considered as in the act of being sent, until they arrived; and therefore, that the consideration was well stated as executory, though they were on their voyage. *Scoble*, that B.'s undertaking left it optional with A. to consider it either as a promise to

accept the bill, or to send a draft, and therefore that it was not necessary to declare on the contract in the alternative. *Smith v. Brown*, 2 Mars. 41; 6 Taunt. 340.

(n) *Of describing bills and notes.*

(n 1) *Of the averment in a bill of "value received."*

May be described as value received "by the drawer." *Grant v. Da Costa*, 3 M. & S. 351.

(n 2) *Of averring the place of payment.*

To describe a note made payable at a particular place, by a memorandum at the foot of it, as payable there, is a misdescription. *Exon v. Russell*, 4 M. & S. Vide BILL OF EXCHANGE.

(n 3) *Of describing a bill, in reality drawn by one, but professedly by two.*

May, as against the acceptor, be described as drawn by two; or *semble*, as by one. *Bass v. Clive*, 4 M. & S. 13.

(n 4) *Of the materiality of an averment of presentment for acceptance.*

It suffices to prove an acceptance. *Clarke v. Cock*, 4 East, 71.

(o) *Of describing a policy of insurance.*

(o 1) *Description of the interest.*

In regard to the number of persons in whom it is laid, the description must neither exceed, *Camden v. Anderson*, 5 T.R. 709; nor fall short of the truth, *Bell v. Ansley*, 16 East, 141; *Cohen v. Hannam*, 5 Taunt. 101.

(o 2) *Description of the loss.*

1. Average is recoverable under the description of total loss. Dougl. 732.

2. A loss is well described as by seizure and detention, though the seizure was followed by condemnation and sale. *Mullett v. Shedden*, 13 East, 304.

3. Loss as by barratry in carrying the ship to places unknown, whereby goods were confiscated, is not disproved by subsequent English sentence of condemnation as enemy's property. *Goldschmidt v. Whitmore*, 3 Taunt. 508.

(o 3) *Miscellaneous.*

1. The usual averment, that certain

persons using trade and commerce under the style and firm of Messrs. H. were interested in the cargo, &c. and that the policy was made for their use, is supported by evidence, that previous to effecting the policy, Messrs. H. had admitted another mercantile house to a joint concern in the property. *Page v. Fry*, 2 B. & B. 240.

2. On a policy at and from Pernambuco, or any other port or ports in the Brazils, to London, beginning the adventure from the loading the goods on board the ship on the termination of her cruise, and preparing for her voyage to London. The ship, on the termination of her cruise, touched at Pernambuco; but failing to procure a cargo there, she proceeded for St. Salvador, and was lost on her voyage thither. Held, that the voyage was well described in the declaration as from Pernambuco to London. *Lambert v. Liddard*, 1 Mars. 149; 5 Taunt. 480.

3. A. and B. trading under the firm of A. and Co. engage in an adventure, and afterwards admit C. and D. as sharers therein. A policy is effected on account of A. and Co. and a loss having happened, the interest is averred in the declaration to be in A. and B.; with other counts, stating it to be in the other parties respectively, which a judge at chambers directed to be struck out. It was left to the jury to say whether all the adventurers were meant to be included, and they found affirmatively. Held, that the plaintiff was entitled to recover accordingly. *Carruthers v. Shedden*, 1 Mars. 416; 6 Taunt. 14.

4. Goods are insured at and from Magadore to London. The declaration avers "that after the loading of the goods, the ship departed on her intended voyage, and while in the course of her said voyage, was lost by perils of the sea." Held, that this was a material allegation, and therefore the ship having been lost while at her moorings, and before the cargo was completed, the insured could not recover. *Abitbol v. Bristow*, 2 Mars. 157; 6 Taunt. 464.

(p) *Of describing a contract to pay money.*

(p 1) *As reasonable reward.*

Semble, is allowable when stated as the consideration of the contract. *Bayley v. Tucker*, 2 N.R. 458.

(q) *Of describing a loan.*(q 1) *Where bullion has been taken as such.*

The description may be as a loan of cash. *Barbe v. Parker*, 1 H. B. 283.

(r) *Of describing a contract for seaman's wages.*

A voyage from A. to B. thence to C. or D, and afterwards to A, is misdescribed as one from A. to B, and thence to C, though the master terminated the voyage at C, and discharged the crew there. *White v. Wilson*, 2 B. & P. 116.

(s) *Of describing an usurious contract.*(s 1) *General rule.*

The contract must be proved as laid. *Rex v. Gillham*, 6 T. R. 265.

(s 2) *Where a surety is joined in the contract.*

The description of the contract to forbear, need notice the principal only. *Wade v. Wilson*, 1 East, 195. *Vide infra*, (s 3) pl. 2.

(s 3) *Miscellaneous cases.*

1. If plaintiff declare upon a corrupt contract on 21 Dec. 1774, giving day of payment to 23 Dec. 1776, evidence of a contract on 23 Dec. 1774, for two years, is a fatal variance. *Carlisle v. Frears*, Cowp. 671.

2. If more than legal interest be taken by the defendant on a note given to A. by B, as a collateral security for money lent to C, and indorsed by A, to the defendant; such usury is well described to be for the forbearance of money lent by the defendant to B. *Manners v. Postan*, 3 B. & P. 343. *Vide supra*, (s 2).

3. If a person discounts a bill, and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest, under pretence of guaranteeing the acceptor; the sum first paid may be laid as forborne to the person who first received the money, on indorsing it to the discounter, even supposing that that person, if sued on the bill, might recover over against the discounter as guarantee. *Lee v. Cass*, 1 Taunt. 511.

4. The defendants, on 30 April 1810, discounted for B. a post dated bill, bearing date the 16th May 1810, and gave in lieu thereof a bill, which had then seven

days to run, and which consequently would become due on the 7th of May; making no rebate. This was described as a loan of the amount of the first bill, from the 7th of May till the 16th; and held well. *Hutchinson v. Piper*, 4 Taunt. 810.

(t) *Miscellaneous cases.*

1. An agreement between two, that all future credits reciprocally given should be set against each other, and the balance only considered as the debt due, may be described in pleading, as having been made with respect to certain specific debts, though afterwards contracted. *Kinnerley v. Hossack*, 2 Taunt. 170.

2. *Vide supra*, I. (m)

III. OF VARIANCE IN THE DESCRIPTION OF TORTS.

(a) *In the description of slander.*

1. The identical words laid must be proved; though in part only, is sufficient. *Maitland v. Goldney*, 2 East, 426.

2. Words spoken interrogatively, are misdescribed as spoken affirmatively. *Barnes v. Holloway*, 8 T. R. 150.

3. Words spoken as the slander of another, are misdescribed as asserted as of defendant's own knowledge. *Bell v. Byrne*, 13 East, 554.

4. Where the declaration stated that the plaintiff was a trader at C, and also a trader at O, and that the defendant spoke concerning the plaintiff as such trader, that he was a bankrupt at C, &c. it was proved at the trial, that the plaintiff carried on a trade at O, but not that he carried on the other trade at C, as stated, and the words spoken of him were, that he was a bankrupt in the liquor trade, (which was the trade carried on at O); held, that the substance of the charge had been proved, and that the place where the plaintiff was stated to have become a bankrupt was immaterial. *Hall v. Smith*, 1 M. & S. 287.

5. A declaration for slandering the plaintiff in the way of his trade, alleged, that he was a carpenter and sworn appraiser; that the defendant spoke the words of him in his trade as a carpenter; and that by reason thereof he was injured; specifying how, in his trade of an appraiser. The plaintiff failed at the trial in proving that he was an appraiser as well as carpenter. Held, that the failure

was immaterial, since the allegation that he was both was partible, and enough remained to sustain the action without such proof. *Figgins v. Cogswell*, 3 M. & S. 369.

6. "She is a great thief, and ought to have been transported seven years ago." The proof was, "she is a bad one, and ought to have been transported seven years ago;" variance fatal. *Hancock v. Winter*, 2 Mars. 502; 7 Taunt. 205.

(b) *In the description of a deceitful representation.*

If consisting in representing the annual returns of a business, sold as of such an amount, the proof must be of the exact amount laid. *Gilbert v. Stanislaus*, 3 Price, 54.

(c) *In the description of a false return to a f. fa. against A. & B.*

An averment that A. & B. had goods is divisible; therefore proof that A. had, is sufficient. *Jones v. Clayton*, 4 M. & S. 349.

(d) *In the description of negligence in an attorney.*

In suing an attorney for neglecting to obtain judgment against a prisoner, and charge him in execution in due time, whereby he was superseded, the day on which the writ was returnable is material, since the question, whether he was guilty of negligence, depends upon whether a certain time had elapsed between the return and the *supersedeas*. A variance, therefore, in stating the return, is fatal. *Secus*, in stating the day on which the writ was sued out. *Green v. Rennett*, 1 T. R. 656.

(e) *In descriptions in trespass.*

1. The plaintiff in trespass for entering his close called A, will succeed, by proving himself entitled to any part of it. *Stevens v. Whistler*, 11 East, 51.

2. If in trespass the plaintiff claims a right throughout the whole of a close, which the defendant denies; he, (the defendant) will succeed, by proving that the right is confined to a particular portion, provided any part of the residue lies in the vill laid in the declaration. *Hawke v. Bacon*, 2 Taunt. 156.

(f) *In descriptions in ejectment.*

Proof need not be of title commensurate with the demise laid. *Doe, d. Shore, v. Porter*, 3 T. R. 13.

IV. OF VARIANCE IN INDICTMENTS.

(a) *For larceny.*

The quantity charged may exceed the truth. *Rex v. Johnson*, 8 M. & S. 348.

(b) *Against a public servant employed in the post-office.*

The averment that he filled several capacities, is divisible. *Figgins v. Cogswell*, 3 M. & S. 371.

(c) *Against a solicitor of an annuity.*

The exact sum laid, as taken for commission, though without a *videlicet*, need not be proved. *Rex v. Gillham*, 6 T. R. 265.

(d) *For slander in office.*

Words spoken in the first person are misdescribed as spoken in the third. *Rex v. Berry*, 4 T. R. 217.

V. OF VARIANCE IN PENAL ACTIONS.

(a) *On the Bribery Act.*

To describe a precept as directed to the bailiffs of the borough, instead of the bailiff, is immaterial. *Warre v. Harbin*, 2 H. B. 113.

(b) *On the Post Horse Act.*

1. The number of horses charged as let, and not accounted for, may exceed the truth. *Radford v. Mcintosh*, 3 T. R. 632.

2. The time of the letting need not be proved as laid. *Sergeant v. Tilbury*, 16 East, 416.

(c) *On the Non-residence Act.*

1. *Semble*, the temporal limit must be proved as laid. *Hardy v. Cathcart*, 5 Taunt. 2.

2. Benefices consolidated are well described as a single benefice. *Wilson v. Van Mildert*, 2 B. & P. 394.

VI. OF VARIANCE IN LOCAL DESCRIPTION.

(a) *General rule.*

The description may be according to common reputation, though erroneous.

Burbidge v. Jacks, 1 B. & P. 225; *Kirtland v. Pounsett*, 1 Taunt. 570; *Williams v. Burgess*, 3 Taunt. 127; *Voules v. Miller*, Id. 140.

(b) *In the description of abutments.*

Abutting, in its strict sense, imports contiguity, though not necessarily through the entire length of the abutment. *Roberts v. Karr*, 1 Taunt. 495.

(c) *Miscellaneous cases.*

1. If a count in trespass charges an injury done to the land and taking the goods *there*, the taking must be proved where laid. Hence the use of a second count for an asportation only. *Smith v. Milles*, 1 T. R. 479.

2. Action upon the case for running down the plaintiff's boat in the river Thames, at a certain place *near* the half-way reach. Proof that the accident happened in the half-way reach. Held, that as the action was transitory, the description was referrible to *venue*, and therefore the variance immaterial. *Drewry v. Twiss*, 4 T. R. 558.

3. Action upon the case for negligently driving a cart against a post-chaise, stating that the plaintiff on, &c. at X. was possessed of a chaise, which at the time when, &c. was travelling in and along the highway *there*. Proof that the accident happened at Y. Held, that the variance was immaterial. *Norfolk v. Young*, 4 T. R. 558.

4. Action upon an agreement to procure a booth at a horse-race on Barnet Common, in the county of Middlesex. Proof that Barnet Common lay in Herefordshire. Held, that the allegation respecting the county being immaterial, might be rejected. *Frith v. Gray*, 4 T. R. 561, n. (a).

5. In an action for the consequences of a nuisance, it is unnecessary to state where it is situated; if, therefore, it is alleged generally to be at such a place, and that place is laid as a *venue* to the other facts in the declaration, it will in this instance likewise be construed as an allegation of *venue*, and not of local description, so as to render it unnecessary to prove that it is situated there. *The Company of Proprietors of the Mersey & Irwell Navigation v. Douglas*, 2 East, 497.

6. In an action for suspending a lamp before plaintiff's house, to denote that he kept a brothel, the parish in which the

declaration states the house to have stood, and the tort to have been committed, is to be considered as *venue* merely, not as local description; and it is immaterial whether there be any such parish in existence. *Jefferies v. Duncombe*, 11 East, 226.

7. Where the premises were laid to be in the parish of Farnham, and were proved to be in Farnham Royal, held immaterial, unless it could be proved that there were two Farnhams. *Doe, ex dem. Tollet, v. Salter*, 13 East, 9.

8. A libel stated—"all which I and my son have done in N. and the neighbourhood," &c. alluding to certain outrages there committed. The indictment for the publication of this libel averred in the introduction, "that outrages (describing them) had been committed in N. and the neighbourhood," and afterwards connected the libellous statement with the introductory averment in the regular way. At the trial it was only proved that outrages had been committed in the neighbourhood of N. The offence was complete, though no outrages had happened in N. Held, that the averment was, not entire but divisible, and the proof sufficient. *Rex v. Sutton*, 4 M. & S. 532.

9. An indictment for a libel, averred that outrages had been committed in and in the neighbourhood of N. The proof was that they had happened fifteen miles from N. Held, that the place might be considered as the neighbourhood. *Rex v. Sutton*, 4 M. & S. 532.

10. A misdescription of the parish, in an action for nonresidence, as St. Ethelburg instead of St. Ethelburga, is fatal. *Wilson v. Gilbert*, 2 B. & P. 281.

11. Lands averred to be in the parish of A. and B, proof that part are in A, part in B, is no variance. *Goodtitle, d. Bremridge, v. Walter*, 4 Taunt. 671.

12. In an action on the case for damaging the plaintiff's wharf, the declaration stated the wharf to be situate near the river Thames, "to wit, at Kingston in the parish of St. Saviour, Southwark, in the county of Surrey," though there was no such place as Kingston in that parish. Held, that the allegation was referrible to *venue*, not local description, and therefore the mistake was immaterial. *Hamcr v. Raymond*, 1 Mars. 363; 5 Taunt. 789.

13. In trespass for breaking and entering a house, the premises were laid in the parish of Clerkenwell. It was proved that Clerkenwell consisted of two parishes or districts, though it was generally known by the name of Clerkenwell. Variance held fatal. *Taylor v. Hooman*, 1 Moore, 161.

VII. OF VARIANCE IN THE DESCRIPTION OF STATUTES.

(a) General rules.

A literal misrecital is fatal. *Boyce v. Whitaker*, Dougl. 94; or mis-stating the year, as four instead of four & five. *Rann v. Green*, Cowp. 474; Dougl. 402.

(b) In the description of st. 28 Eliz. c. 4.

Describing the provision against abuse in executing writs as against body lands, and, instead of, or goods, is fatal. *King v. Marsack*, 6 T. R. 771.

VIII. OF VARIANCE IN THE DESCRIPTION OF COURTS OF JUSTICE.

(a) Assize or Nisi Prius court.

1. May be stated as held before both judges of assize, or the one who actually presided. *Arundell v. White*, 14 East, 216.

2. "Acquitted by a jury in the court of our lord the king, before the king himself at Westminster, before the chief justice," misdescribes an acquittal before the chief justice at Nisi Prius. *Woodford v. Ashley*, 11 East, 508.

(b) Court of general sessions.

May be described as the general quarter sessions. *Busby v. Watson*, 2 Wils. 1050.

(c) Court-leet.

"Held before the steward," instead of the deputy steward, is a misdescription. *Wyvill v. Shepherd*, 1 H. B. 162 (debt for an amercement.)

(d) Sheriffs' court in London.

May be stated as held before the single sheriff who presided. *Arundell v. White*, 14 East, 216.

IX. VARIANCE IN THE DESCRIPTION OF LEGAL PROCEEDINGS.

(a) In debt for the costs of defending an action.

Statement that it was brought against plaintiff, instead of himself and another,

is a misdescription. *Rustall v. Stralton*, 1 H. B. 49; etiam *Readshaw v. Wood*, 4 Taunt. 13.

(b) Statement of an appearance antecedent to a distringas, to a plea relying thereon.

A misdescription of the writ to which the appearance was, is fatal on *nul tiel* record of the appearance. *Myers v. Kent*, 2 N. R. 463.

(c) In the description of the trial of a cause.

The day of trial is immaterial. *Rex v. Payne*, 9 East, 158.

(d) In the description of a judgment.

(d 1) In relation to the term.

A misdescription of the term in which it was given, is fatal, when averred with a *prout patet*. *Rastall v. Straton*, 1 H. B. 49.

(d 2) Against two.

Supra, (a)

(d 3) In relation to names and additions.

Judgment against A. B. Earl of X, as such, is misdescribed as against A. B. commonly called Earl of X. *Blackmore v. Flemyng*, 7 T. R. 447, n.

(d 4) In relation to the day.

The day of an acquittal need not be proved as laid, unless averred with a *prout patet*. *Purcell v. Macnamara*, 9 East, 157; overruling *Pope v. Foster*, 4 T. R. 590.

(d 5) Description of a judgment of *nil capiatur*.

"He, &c. be in mercy" is not misdescribed, as "he and his pledges to prosecute be in mercy." *Judge v. Morgan*, 13 East, 547.

(d 6) Description of a judgment in *scire facias*.

Is misdescribed as one to recover instead of to have execution. *Phillipson v. Mangles*, 11 East, 516.

(e) In the description of an arrest for treason.

Arrest "on suspicion," is misdescribed as "on a charge" of treason. *Bell v. Byrne*, 13 East, 554.

- (f) *In the description of a summons to serve on a jury in a court-leet.*

Is misdescribed as one to serve on the jury of the court-leet and court-baron. *Gery v. Wheatley*, 1 H. B. 163 n. (debt for amercement.)

- (g) *In the description of an arrest under process from the sheriff's court of London.*

May be described as made by virtue of the plaint. *Arundell v. White*, 14 East, 216.

- (h) *In the description of a meeting of magistrates for a division.*

Semble, may be described as for the division of X, a place within the division. *Res v. Sainsbury*, 4 T. R. 451.

- (i) *In the description of a supersedeas in bankruptcy.*

Writ superseding a commission against A, as surviving partner of *Edward Darby*, is misdescribed as one, &c. of *Edmund Darby*. *Matthews v. Dickenson*, 7 Taunt. 399; 1 Moore, 104.

X. VARIANCE IN THE DESCRIPTION OF A CUSTOM.

(a) *General rule.*

Misdescription of a general custom is immaterial, being surplusage. *Stokes v. Mason*, 9 East, 424.

XI. VARIANCE IN THE DESCRIPTION OF A PRESCRIPTION.

(a) *General rules.*

1. A statement exceeding the truth is a misdescription. *Morewood v. Wood*, 4 T. R. 157. One falling short of it, is not. *Corporation of Tewkesbury v. Bricknell*, 1 Taunt. 142. Its extent is measured by the usage. *Ballard v. Dyson*, 1 Taunt. 279.

2. A condition annexed to it, if subsequent, need not be stated. *Brook v. Willet*, 2 H. B. 224.

XII. MISCELLANEOUS CASES.

- (a) *Of describing a manor that has ceased to be such from defect of freehold tenants.*

May be described as such, in claiming existing rights appurtenant thereto. *Soane v. Ireland*, 10 East, 259.

- (b) *Of describing an incorporeal right as appurtenant.*

When enjoyed under a licence (the conveyance being void, *e. gr.*), it cannot be claimed as by reason of the possession of land. *Fentiman v. Smith*, 4 East, 107.

- (c) *Of describing a right of way.*

1. If the *terminus ad quem* has become extinct by unity, the way cannot be claimed as leading to it; if at all, it must be claimed as towards it. *Wright v. Rattray*, 1 East, 377.

2. Leading "from" may be construed inclusively. *Philips v. Davies*, 2 Anst. 572.

- (d) *Of describing a highway as a terminus.*

"Public highway" is a generic term, including every species. *Allen v. Ormond*, 8 East, 4.

- (e) *Of describing a payment by or to an agent or trustee.*

1. If issue be joined generally and without reference to the Annuity Act (*i. e.* without the allegation within the true intent of the act, &c.) on an averment that the consideration was paid by A; proof that it was paid by his agent, supports the issue. *Coare v. Giblett*, 4 East, 85. See 743, (b 15.)

2. Where it is material to prove that a payment was made on a particular day, and issue is joined on that fact; proof that the money was paid on that day to a trustee, to be paid over to the party entitled, on performance by him of a certain condition, with proof of such performance, supports the issue. *Coare v. Giblett*, 4 East, 85. See 743, (b 15.)

- (f) *Of describing a tender demanding change and deductions for property tax.*

Is misdescribed as an absolute tender. *Robinson v. Cook*, 6 Taunt. 336.

- (g) *Of describing the great seal.*

May still be described as the great seal of Great Britain. *Res v. Bullock*, 1 Taunt. 71.

- (h) *Of describing the officers of a township where there are several townships in the parish.*

In a parish consisting of several townships, the officers of a single township

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are well described as the *churchwardens* thereof, if they have always been known by that name. *Stead v. Heaton*, 4 T. R. 669.

(i) *Of describing a corporate assembly.*

The mayor, aldermen, and commons in common council assembled, are not sufficiently described as the mayor and commonalty and citizens, though, in fact, the latter include the former. *Rex v. Croke*, Cowp. 29.

(k) *Of describing costs.*

May be described as damages. *Phillips v. Bacon*, 9 East, 298.

(l) *Of the entirety of a plea,—in general.*

Proof of any part amounting to a defence, is sufficient. *Spilsbury v. Micklethwaite*, 1 Taunt. 146.

(m) *Of the exclusive import of a plea,—of non-joinder of co-contractors.*

It imports that those named alone contracted. *Godson v. Good*, 6 Taunt. 587; S. C. 2 Mars. 299.

(n) *Other cases.*

1. An averment that the freighter offered to send a cargo alongside, but that the master refused to receive it there, and discharged him from sending it alongside, is not proved by an acknowledgment of the master, that the freighter, though willing to send, was prevented by an embargo. *Sjoerds v. Luscombe*, 16 East, 201.

2. An indictment for a libel averred that persons engaged in certain outrages had been reputed to act under the direction of some supposed and unknown person called General Ludd. The evidence in support of this averment proved that General Ludd was merely an imaginary fictitious person, set up for the purposes of a plot. Taking the averment to mean that such a person existed, the evidence bears it out, for he had an existence, namely, an ideal one. *Rex v. Sutton*, 4 M. & S. 532.

3. Averment that plaintiff owed no rent to J. P. for certain premises, is not supported by evidence that the defendant covenanted to pay, in discharge of the plaintiff, the rent that should become due

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to J. P. for those premises. *Sturges v. Farrington*, 4 Taunt. 614.

VENDOR AND PURCHASER.

First.

[A] *In relation to the sale of Real Property.*

I. RELATIVE TO THE SUFFICIENCY OF THE VENDOR'S TITLE.

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V. RELATIVE TO THE VENDEE.

- (a) *Who considered as.*
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First.

[A] *In relation to the sale of real Property.*

I. RELATIVE TO THE SUFFICIENCY OF THE VENDOR'S TITLE.

- (a) *A title valid at law, but invalid in equity.*

Is insufficient. *Maberly v. Robins*, 1 Mars. 258; 5 Taunt. 622, 625; *Elliot v. Edward*, 3 B. & P. 181; accord. *Alpass v. Watkins*, 8 T. R. 516, contra.

- (b) *A title good only by a presumption, which may be rebutted.*

Is insufficient. *Barnwell v. Harris*, 1 Taunt. 430.

- (c) *A title acquired, after notice of intention to rescind, for a supposed defect.*

Is insufficient. *Bartlett v. Tuchin*, 1 Mars. 583; 6 Taunt. 259.

II. RELATIVE TO IMPLIED TERMS AND CONDITIONS.

- (a) *On a sale of parcel,—that vendee shall have the title deeds.*

Semble, no implication to that effect arises. *Yea v. Field*, 2 T. R. 708. See MORTGAGE.

- (b) *On agreement to grant a lease,—to shew title to the fee, and deliver an abstract.*

Semble, no implication to that effect arises. *Temple v. Brown*, 6 Taunt. 60.

- (c) *On the part of a lessee restrained from assignment,—to obtain lessor's consent.*

An implication to that effect arises. *Lloyd v. Crisp*, 5 Taunt. 249.

- (d) *On the sale by one, mistakenly supposing himself entitled as personal representative,—for title as such.*

Implication to that effect arises. *Cripps v. Reade*, 6 T. R. 606.

- (e) *On a sale to a joint devisee for sale.*

Two closes are devised to trustees to sell and divide between A, one of the trustees, and B. It is agreed between the parties that A. shall become purchaser; whereupon each close is valued at a separate sum, which is paid by A, minus his share, and paid over to B: the conveyances are executed by one trustee only, and the title to one of the closes proves defective. Held, that A. might retain the other close, and sue B. for a proportionable part of the money paid by action of money had and received. *Johnson v. Johnson*, 3 B. & P. 162.

III. CONSTRUCTION OF COVENANTS AND CONDITIONS.

- (a) *Condition of avoidance, on default of either party.*

Is not available for the defaulter. *Roberts v. Wyatt*, 2 Taunt. 268.

IV. COVENANTS RUNNING WITH THE LAND.

- (a) *For title on a grant in fee.*

Runs with the land, *e. gr.* to a devisee. *Kingdon v. Nottle*, 4 M. & S. 53.

V. RIGHTS OF THE VENDOR.

- (a) *On refusal by vendee to complete the purchase.*

Where the purchaser of a term refuses to accept a regular assignment, or to return the lease which had been delivered to him to prepare one, the vendor may have trover for it. *Parry v. Frame*, 2 B. & P. 450.

- (b) *On rescission of the purchase.*

Where a sale is rescinded, from the vendor's neglect to make a good title, he cannot sue the vendee who had been let into possession for the use and occupation antecedent to the rescission, at least he cannot, if he has had the use of the purchase-money in the interim (or such a proportion as whence he might have gained an equivalent to the benefit resulting from the occupation.) *Kirtland v. Pownsett*, 2 Taunt. 145.

VI. RIGHTS OF VENDEE.

- (a) *In relation to title,—whether paramount the vendor.*

1. A party cannot be in a better situation

than him from whom he derives his title. *Birch v. Wright*, 1 T. R. 380.

2. If one, knowing of a judgment (or decree) purchase though for a valuable consideration, the purchase is fraudulent, and void against the judgment creditor. Dougl. 88.

(b) *To an abstract delivered.*

Where, under a sale conditioned to be void, if the vendor cannot make a good title, an abstract of his title is delivered to the vendee, the vendee has a right to retain, and may have trover for it against the vendor, until the matter is settled past dispute. *Roberts v. Wyatt*, 2 Taunt. 268.

(c) *To a conveyance delivered as an escrow, and afterwards pledged by the vendor.*

A. sells an estate to B. who pays part of the purchase money, and the title deeds are deposited with C. to be delivered up to B. when he pays the residue. A. gets possession of them again, and pledges them to D. for a valuable consideration. Held, that B, on tendering the remainder of the purchase money, is entitled to recover the deeds from D. *Hooper v. Ramsbottom*, 1 Mars. 414; 6 Taunt. 12.

VII. OF ACTIONS BETWEEN VENDOR AND VENDEE.

(a) *By the vendor.*

(a 1) *Declaration,—avermnt of title.*

1. In an action on an agreement to deliver possession of certain premises, subject to the forfeiture of a stipulated sum, on failure by either party, the person who has to deliver possession, cannot support an action for the forfeiture, although he aver a readiness to deliver possession, without shewing in his declaration a possessory title. *Luxton v. Robinson*, Dougl. 620.

2. In *assumpsit* for the purchase money of an estate, where the condition of sale was to pay on or before the 24th of June, on having a good title; the plaintiff averred that he was seised in fee, and made a title good and satisfactory to the defendant before the 24th of June. Held sufficient, without further particularizing

the title. *Martin v. Smith*, 2 Smith, 543; 6 East, 555.

3. See 239, V. (a)

(a 2) *Evidence,—proof of a series of assignments.*

Where the vendor of premises, deducing his title through various assignments, sues the vendee for not completing the purchase, each assignment must be proved, and not merely the immediate assignment to himself. *Crosby v. Percy*, 1 Taunt. 366, n.

(b) *By the vendee.*

(b 1) *Declaration,—on a covenant against interruption by the vendor.*

In declaring for the breach of a covenant against the lawful interruption of the covenantor, it is sufficient if it appear that the entry was under an assertion of title, without expressly averring that it was made with that intent. *Lloyd v. Tomkies*, 1 T. R. 671.

(b 2) *Measure of damages,—remuneration for the loss of the bargain, through defect of title.*

Upon a contract for a purchase, if the title proves bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to any damages for the supposed goodness of the bargain, which he concludes he has lost. *Flureau v. Thornhill*, 2 Blk. 1078.

Secondly.

[B] *In relation to the sale of Personal Property, (except in relation to stoppage in transitu.)*

I. SALE, WHEN COMPLETE.

(a) *General rules.*

1. When goods are sold, if nothing remains to be done on the part of the seller, as between him and the buyer, before the article is to be delivered, the property has passed. *Whitehouse v. Frost*, 12 East, 614.

2. Where nothing remains to be performed by the vendor, the circumstance of the goods remaining in his possession by election of the vendee, will not prevent the property vesting. *Rugg v. Minett*, 11 East, 210.

(b) *Where preliminary acts are requisite.*

(b 1) *Rule on this subject.*

If by the terms of a contract of sale, further acts touching the thing sold, are to be done by the vendor, to the performance of which it is necessary that he have dominion over the property, the property in the thing sold does not vest in the vendee until the acts are performed. As where the weight of the commodity is to be ascertained, or parcel of a gross commodity separated from the bulk. Hence, where A. having about 18 tons of flax, lying in mats, of unequal or not ascertained weight, at B.'s wharf, sold "ten tons, at 118 £. per ton, to C, the amount to be paid by C.'s acceptance at three months from this day," and gave the vendee an order on B. for ten tons; C. stopped payment before B. had weighed off the quantity. Held, that A. might stop *in transitu*, and countermand the delivery, since the symbolical delivery by an order on the wharfinger, was incomplete, the commodity not being in a deliverable state. *Busk v. Davis*, 2 M. & S. 397.

(b 2) *In relation to the case where a chattel is made to order.*

Where a chattel is made to order, the property therein is not vested in the (*quasi*) vendee, until finished and delivered, though he has paid for it. *Mucklow v. Mangles*, 1 Taunt. 318.

(b 3) *Examples.*

1. A. possessed of 40 tons of oil in one cistern, sold 10 tons to B, who, before it was measured off, sold the same to C. and gave him a written order upon A. to deliver it. C. took the order to A, who wrote thereon "accepted." The delivery is thereby complete. *Whitehouse v. Frost*, 12 East, 614.

2. Where the custom of the trade on the sale of oil was, for a cooper employed by the seller to search the casks, and for a broker on behalf both of buyer and seller, to attend to make a minute of the foot-dirt and water in each cask (for which an allowance is made) and for the casks to be then filled up at the seller's expense, and so delivered;—the property does not pass until these circumstances have taken place. *Wallace v. Breeds*, 13 East, 522.

3. Sugars contracted to be sold at a

price per cwt. cannot be recovered by the vendee in trover, until selected and weighed off. *Austen v. Craven*, 4 Taunt. 644.

4. A. purchases from the defendant a quantity of oil, which was not to be drawn off, but by agreement was to remain undivided in the defendant's cisterns, and for which A. was to pay a weekly rent for warehouse-room. A.'s bill for the oil being dishonoured, and he become bankrupt; held, that the oil, not having been severed from the defendant's stock, this did not amount to such a delivery as would entitle the assignees of A. to have trover for it. *White v. Wilks*, 1 Marsh. 2; 5 Taunt. 176.

(c) *Criterion to determine whether a delivery has been made.*

The criterion to determine whether there has been a delivery on a sale, is to consider whether the vendor still retains, in that character, a right over the property. *Goodall v. Skelton*, 2 H. B. 316.

(d) *Of symbolical delivery.*

Where to a transfer of property a delivery is essential, the commodity must be in a deliverable state, or a symbolical delivery will be ineffectual. *Busk v. Davis*, 2 M. & S. 397.

(e) *Of part delivery.*

1. Where a part of the goods sold by an entire contract, has been taken possession of by the vendee, that shall be deemed a taking possession of the whole. *Slubey v. Heyward*, 2 H. B. 504; *Hammond v. Anderson*, 1 N. R. 69.

2. The delivery of part of an entire quantity of goods contracted for, is not a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, where some act, other than payment of the price, is necessary to be performed in order to vest the property. *Hanson v. Meyer*, 6 East, 614; 2 Smith, 670.

(f) *Of delivery to a carrier.*

Where goods are sent to order by a carrier, the carrier receives them as the vendee's agent. *Vale v. Bayle*, Cowp. 894; even though not named by him, and so the property is vested in the vendee, on delivery to the carrier. *Dutton v. Solomonson*, 3 B. & P. 582.

(g) *Of delivery to a wharfinger.*

A delivery to a wharfinger, to be shipped in due course to order, charges the vendee. And if the vendor writes, upon the wharfinger's assertion, that the goods will go by a particular vessel; on non-arrival thereby, the vendee is bound to apprise the vendor, at the risk of the consequences. *Cooke v. Ludlow*, 2 N. R. 119.

(h) *By an unqualified delivery to a captain of a vessel.*

A. consigns goods to B. abroad, and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to A.'s captain, B. stating it to be on A.'s account as A.'s own goods, and to be delivered to A. The return cargo consisting of more goods than the proceeds of those consigned to B, B. draws bills on A. for the difference, which he sends to his agent with a bill of lading drawn in blank, and desiring the agent, in case of A.'s refusal to accept the bills, to indorse the bill of lading to C. A. refuses to accept the bills, and the bill of lading is accordingly indorsed to C. The ship arrives, and C. demands the goods as indorsee of the bill of lading; the captain, however, refuses, and delivers them to A, who deposits them with D. as his warehouse-man. D. then receives notice from B. to hold the goods for B. as his property. Held, that though the goods might have been delivered to the captain, on condition of A.'s accepting the bills, yet, that as no such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in A. *Ogle v. Atkinson*, 1 Mars. 323; 5 Taunt. 759.

(i) *By assent of a bailee in possession.*

Sale of goods is complete, upon order to wharfinger to deliver, communicated to, and assented to by him. *Lucas v. Dorrien*, 7 Taunt. 278; 1 Moore, 29.

(k) *Where the quality is to be approved on such a day.*

Where the terms of sale, as expressed in the sold note sent to the vendee, and communicated to the vendor, are, that the quality is to be approved on such a day; the contract is binding on both parties, if not disaffirmed before that

day expires. *Humphries v. Carvalho*, 16 East, 45.

II. CONTRACT OF SALE.

(a) *Whether a sale or pledge.*

A broker who accepts bills of exchange, not for the specified amount of a cargo, but for a gross sum generally, on the cargo being placed in his hands for sale, is pawnee, not vendee thereof. *Shiply v. Kymer*, 1 M. & S. 484.

(b) *Mutuality of obligation,—how far essential to.*

A contract of sale may be enforced against the vendee, though it is not binding upon the vendor, from his not having signed it. *Allen v. Bennet*, 3 Taunt. 169.

(c) *Implied terms and conditions of.*(c 1) *In relation to quality.*

The plaintiff bought saffron of an inferior quality, which having kept six months and sold part, he then objected that the article was not saffron. Held, that from the lapse of time, and inferior price given, the inference was, that the article was such as he meant to purchase. *Prosser v. Hooper*, 1 Moore, 106.

(c 2) *In relation to title.*

The rule *caveat emptor* does not apply where by the terms of the contract the buyer is not called upon to exercise his judgment. As where upon the sale of a commodity by weight, the parties agree to refer it to a third person to ascertain the weight; here, if he is mistaken in his estimation, and over-rates it, the buyer may recover back the excess paid beyond the real value. *Cor v. Prentice*, 3 M. & S. 344.

(c 3) *On the sale of a medicine,—that the vendor would not make or vend it.*

A, the proprietor of a medicine, by indenture assigned to B, reserving a proportion of the profits, with a covenant not to make or vend it; B. assigned to C; and afterwards A, reciting the original indenture, sold his reserved right to C, and all other his right, &c. in the medicine. Held, that an implied covenant between A. & C. was thereby raised, that A. would not make or vend it. *Seddon v. Senate*, 13 East, 63.

(d) *Of sales by a broker.*(d 1) *Of variance between bought and sold notes.*

A. agrees to buy, and B. to sell a quantity of "St. Petersburg clean hemp," at a certain price, through the medium of a broker, who acts as agent for both parties. The broker delivers a bought note to A, in which, by mistake, he inserts "Riga Rhine hemp," instead of "St. Petersburg clean hemp," and then delivers a sale note to B, stated correctly according to the original contract. Held that the variance between the two notes was fatal, and no contract arose. *Thornton v. Kempster*, 1 Mars. 355; 5 Taunt. 786.

(e) *On the entirety of the contract.*(e 1) *In relation to payment.*

If goods are sold, to be delivered by a certain day, the vendor, on delivering a portion before the day, cannot sue *pro tanto*. *Waddington v. Oliver*, 2 N. R. 61.

(f) *Construction of the contract.*(f 1) *In the case of an alternative as to payment.*

The debtor shall have his election to take the longer or the shorter credit for goods sold, with an alternative of six or nine months. *Price v. Nixon*, 5 Taunt. 336.

(f 2) *In the case of an extension of time for receiving and delivery.*

A. puts goods up to auction, one of the conditions of sale being, that the goods should be taken away at the buyer's expense within fourteen days, in default of which, the deposit to be forfeited, the goods to be re-sold, and the loss to be made good by the purchaser at the auction. B. buys the goods, and a bought note is then entered into, with this clause,— "fourteen days for receiving and delivery." Held, that the meaning of the two contracts (the conditions of sale, and the bought note,) was, that the fourteen days should be allowed to the purchaser only. *Hogedon v. Laing*, 1 Mars. 514; 6 Taunt. 162.

(f 3) *Obligation to supply the article from the ship named.*

A. agrees to sell to B. "50 tons of St. Petersburg sound clean hemp at 59 l. per ton, to be shipped from St. Peters-

burgh in June or July next, and the ship's name declared as soon as known. If the ship should not arrive by 31 December, the contract to be void." On 5 September A. gives B. notice that the 50 tons were shipped in the *Lively*, but on 20th claims the right (which B. denies) of supplying the deficiency, if any, from another ship. The *Lively* arrives on 20 Sept. with 44 tons, 20 only of which are delivered to B, the rest being ascribed at St. Petersburg to other persons. The remaining 30 tons arrive in another ship on 4 October. Held, 1. That A. was not confined by the contract to one ship:—2. That the notice of 5 Sept. having proceeded on mistake, he was not precluded from supplying the deficiency by another vessel:—3. That he was only bound to deliver to B, from the *Lively*, so much as was ascribed to B. *Thornton v. Simpson*, 2 Mars. 267; 6 Taunt. 556.

(f 4) *Obligation to deliver from the place named.*

Contract for the sale of fifty casks St. Petersburg tallow, at 72 s. per cwt. "warranted ready for delivery from ship or warehouse by 1st November. To be weighed or taken at the king's landing scale, &c." Held, that this was only a general undertaking to deliver; that the words "from ship or warehouse," were immaterial; and therefore, that the omission of those words in the declaration was not a fatal variance. *Thornton v. Jones*, 2 Mars. 287; 6 Taunt. 581.

(f 5) *Obligation to deliver the exact quantity (in the case of the sale of Campeachy logwood.)*

A contract to purchase so many tons of Campeachy logwood at so much per ton, "such as may be determined otherwise, to be rejected," obliges the vendee to accept so much as proves of that description, and at the contract price. *Graham v. Jackson*, 14 East, 498.

(g) *Rescission of the contract.*(g 1) *General rules.*

1. Where by the terms of a contract of sale, the vendee may rescind it, without any acceptance or other act on the vendor's part; by returning the thing sold, the contract is rescinded, though the vendor refuse to receive it. *Towers v. Barrett*, 1 T. R. 133.

a. The concurrence of both vendor and vendee is necessary to rescind a contract of sale; so that if an offer to rescind is made by one and rejected by the other, the latter cannot afterwards, and after the rights of third persons have intervened, by assenting rescind it; as where the former becomes bankrupt in the interim. *Smith v. Field*, 5 T. R. 402.

(g 2) *Where a trial is allowed.*

1. Where there is an agreement to take a horse back, if on trial he shall be found faulty, though it is accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse, for a trial means a reasonable trial. *Adam v. Richards*, 2 H. B. 573.

2. Where a horse is sold with a month's trial, the vendee may rescind the contract at the end of the month, though in the interim he was desired by the vendor to return him, on his saying that he disliked the price. *Ellis v. Mortimer*, 1 N. R. 257.

(g 3) *By one party accepting an offer by the other to rescind.*

If the vendor of goods accepts an offer previously made by the purchaser to return them, the contract is thereby rescinded, and the property reverted from the time of the offer, so as to avoid an attachment in the interim by the creditors of the purchaser. *Salte v. Field*, 5 T. R. 211.

(g 4) *By waiver of the contract,—what considered as.*

If a contract of sale is concluded, and the purchaser, on the commodity being tendered, refuses to receive it, whereupon the seller requests him to sell it for him, which he agrees to do, this amounts to a waiver of the original contract. *Gomery v. Bond*, 3 M. & S. 378.

(g 5) *From defect of title.*

Where one party derives benefit from a thing, the title to which eventually proves defective, he cannot recover the consideration paid to the other, if ignorant of his want of title. *Taylor v. Hare*, 1 N. R. 260.

(g 6) *By alteration in the sale note.*

As against the vendee the contract of

sale is annulled by a material alteration in the sale note, made by the broker at his instance, after delivery. *Powell v. Dixett*, 15 East, 29.

(g 7) *From the purpose for which, &c. having become impracticable.*

If A. transfers goods to B. for a particular purpose, which it afterwards becomes unnecessary or impossible to fulfil, the property is reverted in A. *Tooke v. Holingworth*, 5 T. R. 215; 2 H. B. 501.

III. RELATIVE TO PAYMENT.

(a) *On a ready-money bargain,—waiver of right to prompt payment by delivery.*

If goods are sold, to be paid for in ready money, the vendor should not deliver them without payment. If he does, he consents to waive the mode of payment stipulated for, and lets in any other which by law is accounted such; for instance, a set-off. *Cornforth v. Rivett*, 2 M. & S. 510. See SET-OFF.

(b) *On a bargain for a bill,—bad bill whether considered as payment.*

If goods sold are to be paid for by a good bill, and the bill given proves bad, the vendor may sue the vendee for the price. *Ex parte Dickson*, 6 T. R. 142; and see BILL OF EXCHANGE.

IV. RELATIVE TO THE VENDOR.

(a) *Who considered as,—in a particular case.*

Goods belonging partly to A. and partly to B., are put up to auction at A.'s house, having been entered at the excise in A.'s name, and the catalogue stating them to be all the property of A. C. being the holder of an acceptance of A, purchases several of the articles, without being informed that part of them only were the property of A. and settles with A. for the amount. Held, that the payment to A. was good, and that the auctioneer having suffered C. to take away the goods, without giving him notice not to pay to A, was precluded from recovering from C. the value either of the goods which had been the property of A, or of those which had been the property of B. *Coppin v. Walker*, 2 Marshall, 497; 7 Taunt. 237. So, though there had been no actual settlement, the purchaser would have been entitled to have set off a debt due to him from A.

Coppin v. Craig, 2 Marshall, 501; 7 Taunt. 243.

V. RELATIVE TO THE VENDEE.

(a) *Who considered as.*

- (a 1) *The cestui que use, under circumstances.*

The person who had the benefit of goods sold to a third person, held liable, under circumstances, to the vendor for the price. *Railton v. Hodgson*, 4 Taunt. 576.

- (a 2) *On a transfer by the vendee to a third person.*

The vendor of goods sold and delivered to A, and transferred to B, by consent, may sue B. for the price. *Browning v. Stallard*, 5 Taunt. 450.

- (a 3) *On a purchase by one of two traders trading jointly and separately.*

There is an agreement between A. and B, traders, A. on his separate account in England, A. and B. on their joint account in Ireland, that goods ordered by A. to be purchased by B. for the house of A. and B, shall be charged at prime cost. Held that B. as well as A. was liable to the seller for goods so purchased, and that the debt arose in England. *Williams v. Nunn*, 1 Taunt. 270.

VI. OF ACTIONS BETWEEN VENDOR AND VENDEE.

(a) *By the vendor.*

- (a 1) *Evidence,—proof of the dishonour of a bill given in payment, on whom thrown.*

Quære, whether on the buyer or seller, in an action for goods sold? *Hickling v. Hardy*, 7 Taunt. 312; 1 Moore, 61.

(b) *By the vendee.*

- (b 1) *Declaration in an action for non-delivery,—averment of price, whether requisite.*

Semble, that in *assumpsit* for not delivering goods purchased, a specific sum as the price agreed on must be stated. *Andrews v. Whitehead*, 13 East, 102.

- (b 2) *Declaration in an action for non-delivery,—averment of price by reference.*

A declaration for not delivering goods "at the price aforesaid," referring to an

antecedent averment that they were to have been delivered "at a certain price," is bad. *Andrews v. Whitehead*, 13 East, 102.

- (b 3) *Declaration in an action for non-delivery,—averment of readiness to accept.*

In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, "that the plaintiff was ready and willing to accept and pay for the goods." *Wilks v. Atkinson*, 1 Mars. 412; 6 Taunt. 11.

- (b 4) *Declaration in an action for deceit,—averment of scienter.*

Where on the sale of personal property there is no warranty, no action lies against the vendor, unless he knew of the defect, whether of title or quality; therefore, when sued, his knowledge must be averred and proved. *Springwell v. Allen*, 2 East, 448, n. (*S. C. Aleyn*, 91); *Paget v. Wilkinson*, *Ibid.*; *Dowding v. Mortimer*, *Id.* 448, 449.

- (b 5) *Evidence,—of readiness to accept, from a demand by a servant.*

Demand of delivery of goods sold is sufficient proof of an averment that plaintiff was ready and willing to perform his part of the contract, although that demand was made by his servant, when he himself was not present to have done so, if required, on the spot. *Squier v. Hunt*, 3 Price, 68.

VII. MISCELLANEOUS.

- (a) *Of the vendor's duty to insure, pursuant to a carrier's notice.*

Where goods are sent to order by a carrier, and lost, the vendee cannot be charged, where the vendor neglected to insure pursuant to the carrier's notice, which was notorious. *Clarke v. Hutchins*, 14 East, 475.

- (b) *Sale, whether invalidated by the want of a revenue license in the vendor.*

Where no fraud upon the revenue is intended, but there is a neglect only by the vendor to take out a license, or enter himself as a dealer, the contract of sale is valid. *Johnson v. Hudson*, 11 East, 180.

Thirdly.

[C] *Of Stoppage in transitu.*

I. THE NATURE OF THE RIGHT DEFINED.

(a) *Is founded on equitable principles.*

The doctrine of stoppage *in transitu* is founded upon equitable principles only. *Lickbarrow v. Mason*, 2 T. R. 75; S. C. 5 T. R. 683; 1 H. B. 357; 2 H. B. 211.

(b) *The relation of vendor and vendee is essential to its exercise.*

Questions touching the right of stoppage *in transitu* can only arise between vendor and vendee, not between principal and factor; it being a right to re-vest property, which in the case of a consignment to a factor is never divested out of the principal; the only right given to the factor is a lien upon the property after he has obtained possession. *Kinloch v. Craig*, 3 T. R. 783.

II. OF THE PARTY ENTITLED TO EXERCISE THE RIGHT.

(a) *A purchaser upon his own credit for another.*

A purchaser upon his own credit, by order of another person to whom he consigns, is a vendor entitled to stop *in transitu*. *Feise v. Wray*, 3 East, 93.

III. WHEN ALLOWABLE.

(a) *On the vendee's insolvency.*

As between the vendor and vendee of goods, the former has a right to stop the goods *in transitu*, if the latter become insolvent before they are delivered. *Lickbarrow v. Mason*, 2 T. R. 63; S. C. 5 T. R. 683; 1 H. B. 357; 2 H. B. 211; *Reader v. Knatchbull*, 5 T. R. 218. See 5 T. R. 367.

(b) *Where notes given in payment prove bad.*

Where notes given in payment of goods turn out bad, the goods may be stopped *in transitu*. *Owenson v. Morse*, 7 T. R. 64.

IV. WHETHER AFFECTED BY THE RIGHTS OF THIRD PERSONS.

(a) *A carrier's lien for his general balance.*

The right of stoppage *in transitu* is not affected by the carrier's right to a lien for

his general balance against the consignee. *Oppenheim v. Russell*, 3 B. & P. 42.

V. A STOPPAGE DEFINED.

(a) *In particular instances.*

1. The vendor sent goods to the vendee; and a letter of advice inclosing the invoice was sent to, and received by, the vendee, and the goods were received by a wharfinger on his account, who debited the vendee for the charges, &c. The vendee suspecting himself to be insolvent, and having committed an act of bankruptcy, refused to receive the goods from the wharfinger, and left them in his hands for the use of the vendor,—the vendor demanded the goods from the wharfinger before a commission issued, and the wharfinger promised not to deliver them out of his custody until he was certain of a safe delivery. The stoppage is complete. *Mills v. Ball*, 2 B. & P. 457.

2. A. having a quantity of hemp in the hands of B, sells part of it to C, at a certain price, payable by C's acceptance at a stated time, fourteen days allowed for delivery, and gives C. an order upon B, to weigh and deliver the hemp so sold to C, or bearer. Before the fourteen days had expired, A. gives B. notice not to deliver the hemp to C. The hemp not having been weighed off, and no bill of exchange having been given in payment for it. Held, that the sale of it to C. was incomplete, and that B. was liable for it in trover by A. *Shepley v. Davis*, 1 Mars. 252; 5 Taunt. 617.

3. A. delivers goods to a carrier to be conveyed to B. While they are *in transitu*, A. gives notice not to deliver them; but by the mistake of the carrier, they are delivered to B, who disposes of part of them, and soon afterwards becomes bankrupt. Held, that the delivery to B. was incomplete, and therefore that A. was entitled to recover in an action of trover against the assignees. *Litt v. Cowley*, 2 Mars. 457; 7 Taunt. 169.

VI. RELATIVE TO THE DETERMINATION OF THE TRANSIT.

(a) *By arrival, and what is.*

Where the vendee has no warehouse, or no other place of delivery than the warehouse of the packer, &c. and there is no place of ulterior delivery in view, the *transitus* will be considered as at an end,

when the goods have arrived at such warehouse. *Richardson v. Goss*, 3 B. & P. 119; *Leeds v. Wright*, 3 B. & P. 320; *Scott v. Pettit*, Id. 469.

(b) *By delivery, and what is.*

A. of London, being in danger of insolvency, goes to Glasgow, and obtains goods from B, for which he pays by a bill on a house in London, which he knows to be insolvent. The goods are shipped at Leith, (the invoice and receipt from the ship-owner being made out to A.) and are delivered to C, at a wharfinger's in London, who afterwards receives notice to hold them for B. A. becomes bankrupt. In an action of trover by A, against C, for the benefit of the assignees,—held, 1st, that the receipt being made out to A, operated as a delivery to him; and therefore that B.'s right of stoppage in *transitu* was gone:—2. That there was not such conclusive evidence of fraud on the part of A. as to avoid the contract. *Noble v. Adams*, 2 Mara. 366; 7 Taunt. 59.

(c) *By delivery to an agent.*

Goods sent by the vendor to the vendee's agent at X, under an order from the vendee to be so sent, "to be shipped for Y. as usual," (alluding to former transactions) where the vendee's correspondent resided, cannot be stopped, after delivery to the agent at X. *Dixon v. Baldwin*, 5 East, 175.

(d) *By delivery on board a chartered ship.*

A delivery on board a chartered, any more than a general ship, does not divest the right to stop in *transitu*. *Bohtlink v. Inglis*, 3 East, 381. See *Inglis v. Usherwood*, 1 East, 515.

(e) *By acts of dominion.*

By the vendor's assent to a sale by the vendee, and marking the goods by the new purchaser with his own initials, the transit is at an end. *Storck v. Hughes*, 14 East, 308.

(f) *By part payment.*

The right of stoppage in *transitu* does not proceed on the ground of rescinding the contract; but it is an equitable lien adopted by the law, for the purposes of substantial justice. Hence, the circumstance of the vendee having paid in part for the goods, will not defeat the vendor's

right of stopping them in *transitu*: the vendor has a right to retake them, unless their full price has been paid; and the only operation of a partial payment is to diminish the lien *pro tanto*. *Hodgson v. Loy*, 7 T. R. 440; *Feise v. Wray*, 3 East, 93.

(g) *By a re-sale.*

When the master of a ship receives goods on board, and gives a receipt for them, he is not bound to deliver the bill of lading, except to the person who can produce the receipt in exchange for it. Therefore, where A. sells goods to B, to be delivered "free on board," and loads them on board C's vessel, taking a receipt, which purports that the goods were received "for and on account of A," or even without these words; B. sells the goods to D, who, without the consent of A, obtains a bill of lading from C; B. becomes bankrupt. Held, that A, being in possession of the receipt, is entitled to stop the goods in *transitu*. *Craven v. Ryder*, 2 Mara. 127; 6 Taunt. 433. See *Atkinson v. Barnes*, Loft. 325.

(h) *By transfer of a bill of lading.*

1. The assignment by the consignee of a bill of lading, *bonâ fide* and for valuable consideration, whether by a full or blank indorsement and delivery, transfers the property in its contents to the assignee; so that the consignor cannot, on the insolvency of the consignee, stop in *transitu*. *Lickbarrow v. Mason*, 2 T. R. 63; 5 T. R. 683; 1 H. B. 357; 2 H. B. 211.

2. If a bill of lading is transferred by the consignee for a consideration short of the price of its contents, but without notice that the contents have not been paid for, and the indorsee afterwards, with notice of that fact, agree that himself and the consignee shall be partners in the contents: his original right is thereby compromised, and he must stand upon his new one only; and since that is no better than the consignee's, the consignor, on insolvency of the latter, may stop in *transitu*. *Salomons v. Nessen*, 2 T. R. 674.

(i) *By bankruptcy.*

Bankruptcy in the vendee, any more than insolvency, is not in itself a countermand of delivery. If, therefore, the

VENDOR AND PURCHASER.

goods reach the possession of the assignee under the commission (in whom by the assignment the property is vested) before they are stopped, the right of stoppage in the vendor is at an end; as if he puts his mark upon them, since then the carrier becomes his agent in charge. *Ellis v. Hunt*, 3 T. R. 464.

(k) *By delivery to a workman.*

Where on a sale of goods they are delivered by agreement between the vendor and purchaser to a third person, for work to be done to them, who is to return them to the vendor, by whom he is to be paid; the goods, whilst in his hands, are in *transitu*, and, therefore, all other essentials concurring, may be stopped by the vendor. *Owenson v. Morse*, 7 T. R. 64.

VENUE.

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 - (a 2) *In pleas in abatement for non-joinder*, p. 993.
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- (b) *Where laid in civil actions.*
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- (c) *Where laid in indictments.*
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- (a 4) *From the contract being to be performed abroad, p. 995.*
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- (a) *Grounds of.*
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 - (a 3) *From the cause having arisen partly in a third county or abroad, p. 995.*

I. THE PLACE ASCERTAINED AT WHICH THE CAUSE OF ACTION ACCRUED.

- (a) *On the sale of goods forwarded by a carrier to order.*

The place where the delivery to the carrier was made. *Harwood v. Lester*, 3 B. & P. 617.

(b) *In torts arising out of contracts.*

The place where the injury is received.
Williams v. Land, 4 Taunt. 729.

II. ON THE STATEMENT OF A VENUE.

(a) *When requisite.*

(a 1) *In indictments,—against a miller, for substituting other meal.*

Must be laid to the receipt. *Rex v. Haynes*, 4 M. & S. 214.

(a 2) *In pleas in abatement for non-joinder.*

Is unnecessary; and if laid, surplusage.
Neale v. Gary, 7 T. R. 243.

(a 3) *In replications to pleas in abatement.*

Replication to a plea of *ne unques accouple*, stating a marriage at Edinburgh, in Scotland, without laying any venue in England, is unobjectionable. *Ilderton v. Ilderton*, 2 H. B. 145.

(b) *Where laid in civil actions.*

(b 1) *Where there is a choice between two counties,—general rule.*

May be laid in either of two counties in which facts, equally essential, happened.
Scott v. Brest, 2 T. R. 241; *Corporation of London v. Cole*, 7 T. R. 583.

(b 2) *Where there is a choice between two counties,—in an action for driving a distress out of the county.*

May be laid in either. *Pope v. Davis*, 2 Taunt. 252.

(b 3) *Where the cause has arisen in foreign parts.*

The cause may be laid as arising in England. *Mostyn v. Fabrigas*, Cowp. 177.

(b 4) *In torts connected with contract.*

Vide *supra*, I. (b).

(c) *Where laid in indictments.*

(c 1) *In indictments under stat. 39 Geo. III, c. 85.*

Where the receipt is in one county, and refusal to account in another, *semble*, must be laid in the latter. *Rex v. Taylor*, 3 B. & P. 596.

(c 2) *In indictments for fabricating false vouchers.*

Procuration abroad of a delivery in Middlesex, is indictable in Middlesex.
Rex v. Brisac, 4 East, 164.

(d) *Mode of stating.*

(d 1) *In civil actions,—general rule.*

A county is sufficient without a parish.
Ware v. Boydell, 3 M. & S. 148.

(d 2) *In civil actions,—in an indebitatus count.*

The venue laid at the beginning pervades the whole. *Emery v. Fell*, 2 T. R. 28.

(d 3) *By an averment of reference.*

"The county aforesaid," always refers to that in the margin. *Sutton v. Fenn*, 2 Blk. 847; 3 Wils. 339.

(d 4) *Defects in,—how objected to.*

Only by special. *Mellor v. Barber*, 3 T. R. 387; demurrer. *Corporation of London v. Cole*, 7 T. R. 583.

(d 5) *Influence of the county in the margin.*

May aid, but cannot vitiate. *Mellor v. Barber*, 3 T. R. 387.

(e) *Mode of stating in indictments.*

(e 1) *By necessary intendment.*

"A, late of X, in the county of B, with force and arms, at the parish aforesaid;" does not imply that X is a parish. *Rex v. Mathews*, 5 T. R. 162.

III. OF CHANGING THE VENUE.

(a) *Grounds of.*

(a 1) *The cause having wholly arisen in the county to which, &c.—Examples in which it did not wholly arise.*

1. A libel written in one county and received in another. *Pinkney v. Collins*, 1 T. R. 571; *Hoskins v. Ridgeway*, *Ibid*; *Clissold v. Clissold*, *Id.* 647.

2. A contract made in England, to be performed in Ireland. *Walker v. Wright*, 4 East, 495.

(a 2) *Residence of the witnesses in the county to which, &c.*

1. Is no ground where the pleadings shew that few witnesses will be required. *Watt v. Daniel*, 1 B. & B. 425.

2. The objection that some circumstances happened in the county laid, is removed by undertaking to admit them. *Holmes v. Wainwright*, 3 East, 329; *Walker v. Wright*, 4 East, 495.

(b) *By way of amendment.*

Is allowable only on special grounds.

Ayres v. Busfon, 2 Mars. 121; 6 Taunt. 408.

(c) *Application for,—whether too late.*

(c 1) *After a summons for time to plead.*

No; unless the terms offered are accepted. *Wilson v. Harris*, 2 B. & P. 320.

(c 2) *After an order for time on the usual terms.*

Not in K. B.; unless a trial would be lost. *Shipley v. Cooper*, 7 T. R. 698; and n.; *Petyt v. Berkeley*, Cowp. 510. *Secus*, in Exchequer. *Waring v. Holt*, 3 Price, 3.

(c 3) *After plea.*

Is too late, unless a rule nisi was then pending. *Talmash v. Penner*, 3 B. & P. 12.

(c 4) *After the cause has been once taken down.*

Is too late. *Pearce v. Porkington*, 2 N. R. 58.

(c 5) *After a trial.*

Is too late. *Butts v. Bilk*, 1 Price, 146.

(d) *Affidavit for.*

(d 1) *Form of, in general.*

It must be drawn up "upon reading the declaration." R. 11 East, 273.

(d 2) *Form of,—where the grounds are that the cause has arisen, &c.*

Precise adherence to established form is requisite; i. e. that the cause arose in A. and not in B. or elsewhere out of A. *Allen v. Griffiths*, 3 T. R. 495; *Adams v. Arentell*, 1 Mars. 243.

(d 3) *Form of,—where the grounds are that the witnesses reside, &c.*

Must specify how many they are. *Evans v. Weaver*, 1 B. & P. 20.

(d 4) *Construction of,—exclusion of inducement from the term "cause."*

It is excluded. *Guard v. Hodge*, 20 East, 32.

(e) *To a county palatine.*

(e 1) *Whether matter of right, or favour.*

Of favour. *Gibson v. Macbride*, 1 Taunt. 432.

(e 2) *Must undertake not to assign error, for want of an original.*

Cove v. Heaton, 1 Taunt. 120.

(f) *To a Welch county,—whether of course.*

Yes. *Hopkins v. Lloyd*, 6 East, 355.

(g) *To a city.*

Is allowable; and the venue will be to the next adjoining county. *Bird v. Morse*, 7 Taunt. 385.

(h) *By one of several defendants.*

(h 1) *After judgment by default against the other.*

Semble, is not allowable. *Groves v. Thackery*, 5 Taunt. 631.

(h 2) *To a county palatine.*

Is not allowable. *Eccles v. Holland*, 4 M. & S. 233; *Braddely v. Rippon*, 5 Taunt. 87; *Groves v. Thackery*, 5 Taunt. 631.

(i) *In particular actions.*

(i 1) *In actions on written instruments in general.*

Is not allowable. *Morice v. Harry*, 7 Taunt. 306; 1 Moore, 54.

(i 2) *In debt on bond.*

Is not allowable, unless under special circumstances. *Foster v. Taylor*, 1 T. R. 781; *Flecke v. Godfrey*, Id. 782, n.; *Pole v. Horrabin*, Ibid.

(i 3) *In actions on bills and notes.*

Is not allowable in C. B. though other causes are included. *Shepherd v. Green*, 5 Taunt. 576. *Secus*, under like circumstances, in Excheq. *Baskerville v. Cooper*, 1 Price, 374.

(i 4) *In actions on awards.*

Semble, is not allowable, though other causes are included. *Whitburn v. Staines*, 2 B. & P. 385.

(i 5) *In actions for scand. mag.*

Is allowable to obtain a fair trial. *Loft*, 210.

(i 6) *In actions for infringing patents.*

Can only be changed into Middlesex. *Cameron v. Gray*, 6 T. R. 363.

(i 7) *In actions for crim. con.*

Is allowable. *Guard v. Hodge*, 10 East, 32.

- (i 8) *In local actions.*
Is allowable. *Lofft*. 50.
- (k) *In revenue informations by the attorney general.*
Is not allowable without his consent. *Attorney General v. Smith*, 2 Price, 113.
- (l) *Where the cause has arisen partly abroad.*
Is allowable. *Metcalf v. Markham*, 3 T. R. 652.
- (m) *Waiver of the right.*
(m 1) *Whether by pleading pending the rule for changing.*
No. Moses v. Stevenson, 1 Taunt. 58.

IV. OF RETAINING THE VENUE.

- (a) *Grounds of.*
(a 1) *Denial of the defendant's affidavit.*
Is not sufficient. *French v. Coppinger*, 1 H. B. 216; unless under circumstances of mutual inconvenience. *Dick v. Norrish*, 3 Taunt. 464.
- (a 2) *From the cause having arisen in both counties.*
Is not sufficient. *Henshaw v. Rutlay*, 1 N. R. 110.
- (a 3) *From the cause having arisen partly in a third county, or abroad.*
Is sufficient. *Collins v. Jacob*, 3 B. & P. 579; *Hope v. Bennet*, 2 N. R. 397; *Neale v. Nevill*; *Savory v. Spooner*, 2 Mars. 278; 6 Taunt. 565.
- (a 4) *From the contract being to be performed abroad.*
Is sufficient. *McClure v. McKeand*, 2 Taunt. 197.
- (a 5) *From the plaintiff's witnesses residing in the county in the declaration.*
Is not sufficient, where a view is essential. *Hodinott v. Cox*, 8 East, 268; *Vide Anon.* 3 Smith, 434.
- (a 6) *Because an impartial trial cannot be had.*
Is sufficient. *Petyt v. Berkeley*, Cowp. 510; *Watt v. Daniel*, 1 B. & P. 425; unless the interest objected is equal. *Anon.* 5 Taunt. 605.

- (b) *Application for, whether too late.*
(b 1) *After the cause has gone down to trial, and been made a remanet.*
No. Buckshaw v. Hopkins, Cowp. 409.
- (b 2) *After error assigned for want of an original, on a change to a county palatine.*
Is too late. *Millington v. Goodwin*, 7 Taunt. 466; 1 Moore, 186.
- (c) *Of the undertaking thereon.*
(c 1) *When unnecessary,—where the cause arose abroad.*
Is unnecessary. *Neale v. Nevill*; *Savory v. Spooner*, 2 Mars. 278; 6 Taunt. 565.
- (c 2) *Subject matter of,—where the cause arose partly in a third county.*
Must be in K. B. to give evidence in the county in the declaration. *Price v. Woodburn*, 2 Smith, 446; 6 East, 433. In C. B. only in the third county. *Hunt v. Bridgeford*, 1 Taunt. 259; *Neal v. Neville*; *Savory v. Spooner*, 6 Taunt. 565; 2 Mars. 278.
- (c 3) *Consequence of the non-compliance with.*
The plaintiff will be nonsuited. *Santler v. Heard*, 2 Blk. 1031.
- (c 4) *How satisfied,—in relation to the extent of the proof.*
Proof of anyone essential fact is sufficient. *Watkins v. Towers*, 2 T. R. 275; *Neal v. Nevill*; *Savory v. Spooner*, 6 Taunt. 565; 2 Mars. 278. Thus, of the delivery of goods, for which the action is brought, to a carrier to be delivered to defendant. *Powell v. Rich*, 2 Mars. 494; 7 Taunt. 178.
- (c 5) *How satisfied,—in relation to the time at which the proofs accrued.*
The time is immaterial. *Watkins v. Towers*, 2 T. R. 275.
- (c 6) *How satisfied,—whether by proofs establishing the character in which the plaintiff is suing.*
Is not satisfied thereby. *Clarke v. Reed*, 1 N. R. 310. But held by K. B. that one suing as bankrupt assignee satisfied it by producing the commission. *Kensington v. Chanter*, 2 M. & S. 36.

(c 7) *How satisfied,—whether by proof of facts arising abroad.*

Is satisfied thereby in *C. B. Gerard v. De Robeck*, 1 H. B. 280; *Anon.* 2 Taunt. 197. *Secus*, in *K. B. Preston v. Stratton*, 2 Smith, 157.

(c 8) *How discharged,—by issue taken on a special plea.*

Is thereby discharged. *Cockerell v. Chamberlayne*, 1 Taunt. 518; *Soulaby v. Lea*, 3 Taunt. 86.

VERDICT.

I. APPLICATION OF A GENERAL ONE.

(a) *By aid of the judge's notes*, p. 996.

(b) *By the mere act of the court*, p. 996.

(c) *By compulsion*, p. 996.

II. CONCLUSIVENESS OF.

(a) *Though entered by mistake*, p. 996.

III. OF THE PERSONS BOUND OR AFFECTED BY.

(a) *On questions of public right*, p. 996. (See WRITTEN INSTRUMENT.)

IV. AMENDMENT OF.

(a) *General rule*, p. 996.

(b) *By applying it to another count found for defendant*, p. 996.

(c) *Of a variance*, p. 996.

(d) *In matters of calculation*, p. 996.

V. AFTER THE DEATH OF A PARTY.

(a) *Death after the commission day, and before the trial*, p. 996.

VI. OF SPECIAL VERDICTS.

(a) *Form of*, p. 997.

(b) *Degree of certainty in*, p. 997.

VII. OF MISCONDUCT IN THE JURY IN RELATION TO.

(a) *By what medium established*, p. 997.

I. APPLICATION OF A GENERAL ONE.

(a) *By aid of the judge's notes.*

Is allowable; as where some counts

are defective, and though the evidence applied to all. *Eddowes v. Hopkins*, Dougl. 376, 730; *Taylor v. White*, Id. 746; *Williams v. Breedon*, 1 B. & P. 329.

(b) *By the mere act of the court.*

Is allowable; and here they confined it to the issue on a new assignment. *Webb v. Allen*, 1 Anst. 261.

(c) *By compulsion.*

Plaintiff is compellable, in the ensuing term, to elect on what counts he will enter a general verdict. *Lee v. Muggeridge*, 5 Taunt. 36.

II. CONCLUSIVENESS OF.

(a) *Though entered by mistake.*

Is conclusive in a collateral proceeding. *Reed v. Jackson*, 1 East, 355.

III. OF THE PERSONS BOUND OR AFFECTED BY.

(a) *On questions of public right.*

Is evidence between third persons. *Reed v. Jackson*, 1 East, 355.

IV. AMENDMENT OF.

(a) *General rules.*

Is only allowable to meet an apparent intent. *Jackson v. Williamson*, 2 T. R. 281; *Spencer v. Goter*, 1 H. B. 78. The *postea* may be amended by the judge's notes, and at any time. *Doe, d. Church, v. Perkins*, 3 T. R. 749.

(b) *By applying it to another count found for defendant.*

Is not allowable. *Hardy v. Cathcart*, 5 Taunt. 2.

(c) *Of a variance.*

Is allowable, by the judge's notes, when a palpable mistake. *Manners v. Postan*, 3 B. & P. 343.

(d) *In matters of calculation.*

Is allowable, by the judge's notes. *Vernon v. Hankey*, 2 T. R. 113.

V. AFTER THE DEATH OF A PARTY.

(a) *Death after the commission day, and before the trial.*

The verdict is good. *Jacobs v. Mimi-coni*, 7 T. R. 31.

VI. OF SPECIAL VERDICTS.

(a) *Form of.*

Must find facts, not evidence. *Newling v. Francis*, 3 T. R. 198.

(b) *Degree of certainty in.*

Is less than in pleading. *Bury v. Philips*, 2 T. R. 354.

VII. OF MISCONDUCT IN THE JURY IN RELATION TO.

(a) *By what medium established.*

Not by the juror's own testimony. *Vaise v. Delaval*, 1 T. R. 11; *Owen v. Warburton*, 1 N. R. 326.

VILL.

I. TEST OF.

(a) *A constableness*, p. 997.

II. EXAMPLE OF, p. 997.

I. TEST OF.

(a) *A constableness.*

Where there is a constable, there there is a township. *Rex v. Horton*, 1 T. R. 374.

II. EXAMPLE OF.

There is a piece of ground called X, within the precincts or liberties of the castle of Y. About seven years ago houses were for the first time erected upon it. The castle, with all its precincts, has always been deemed extra-parochial; and no part of it has ever been reputed to be a vill, or treated as such. X. is no vill, and therefore not liable to the appointment of overseers. *Rex v. Standard Hill*, 4 M. & S. 378.

VISITOR.

I. RELATIVE TO THE APPOINTMENT OF.

(a) *By implication*, p. 997.

II. RELATIVE TO THE JURISDICTION OF.

(a) *Extent of*, p. 997.(b) *In his own cause*, 997.(c) *How exercised*, p. 997.

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III. RELATIVE TO THE JUDGMENT OF.

(a) *Conclusiveness of*, p. 997.(b) *Form of pleading it*, p. 997.

IV. OF GRANTING A MANDAMUS TO.

(a) *To hear an application*, p. 998.

V. IN RELATION TO THE SUCCESSION TO.

(a) *On extinction of the founder's heirs*, p. 998.

VI. RELATIVE TO VISITATION.

(a) *What is or is not*, p. 998.

I. RELATIVE TO THE APPOINTMENT OF.

(a) *By implication.*

Patronage and visitation are necessary attendants upon the founder of a corporation. *Philips v. Bury*, 2 T. R. 352. As to their delegation: A power of interpreting the statutes in case of doubt—or a special power delegated in particular cases—or a power delegated to the ordinary in particular instances—does not make a general visitor. *Case of Ravensworth Hospital*, 8 East, 221.

II. RELATIVE TO THE JURISDICTION OF.

(a) *Extent of.*

If meant to be restrained, must be expressly limited. *Rex v. Bishop of Worcester*, 4 M. & S. 415.

(b) *In his own cause.*

Cannot be, though the acts were done in another capacity, unless expressly empowered. *Rex v. Bishop of Ely*, 2 T. R. 290.

(c) *How exercised.*

Need not be by common law rules; but unless the visit is general, should be by appeal. *Rex v. Bishop of Ely*, 2 T. R. 290.

III. RELATIVE TO THE JUDGMENT OF.

(a) *Conclusiveness of.*

Given as patron, is conclusive. *Rex v. Bishop of Ely*, 2 T. R. 290; *Philips v. Bury*, Id. 351, 353.

(b) *Form of pleading it.*

The cause of a sentence of deprivation

A A

need not be disclosed. *Bury v. Philips*, 2 T. R. 354.

IV. OF GRANTING A MANDAMUS TO.

(a) *To hear an application.*

It lies, on his refusal to receive and hear it. *Rex v. Bishop of Lincoln*, 2 T. R. 338; *Rex v. Bishop of Ely*, 5 T. R. 475.

V. IN RELATION TO THE SUCCESSION TO.

(a) *On extinction of the founder's heirs.*

Where the corporation is eleemosynary, and no succession established, it devolves to the King in chancery. *Rex v. St. Catherine's Hall*, 4 T. R. 233.

VI. RELATIVE TO VISITATION.

(a) *What is or is not.*

Administering an oath. *Philips v. Bury*, 2 T. R. 348. Hearing and redressing complaints, *Id.*

VOLUNTARY CONVEYANCE.

I. WHAT CONVEYANCES ARE VOID AGAINST A PURCHASER OR CREDITOR.

- (a) *Fraud an essential to*, p. 998.
- (b) *Whether against a subsequent purchaser, with notice*, p. 998.
- (c) *Miscellaneous cases*, p. 998.

II. A PURCHASER FOR VALUE DEFINED.

- (a) *Who considered as.*
 - (a 1) *General rule*, p. 998.
 - (a 2) *Miscellaneous cases*, p. 998.
- (b) *Who not considered as*, p. 998.

I. WHAT CONVEYANCES ARE VOID AGAINST A PURCHASER OR CREDITOR.

- (a) *Fraud an essential to.*
Is such. *Doe, d. Watson, v. Routledge*, Cowp. 705.
- (b) *Whether against a subsequent purchaser, with notice.*
Yes. *Chapman, d. Staverton, v. Emery*, Cowp. 278; *Doe, d. Otley, v. Manning*, 9 East, 59; *Doe, d. Parry, v. James*, 16

East, 212; though there was an intermediate fraudulent conveyance, *Doe, d. Borhell, v. Martyr*, 1 N. R. 332.

(c) *Miscellaneous cases.*

See *Goodright, d. Humphreys, v. Moses*, 2 Blk. 1019; *Chapman, d. Staverton, v. Emery*, Cowp. 278; *Dewey v. Baynton*, 6 East, 257.

II. A PURCHASER FOR VALUE DEFINED.

(a) *Who considered as.*

(a 1) *General rule.*

A purchaser *bond fide*, for good consideration, as marriage. *Doe, d. Watson, v. Routledge*, Cowp. 705.

(a 2) *Miscellaneous cases.*

- 1. A lessee at rack-rent. *Goodright, d. Humphreys, v. Moses*, 2 Blk. 1019:—
- 2. A grant in consideration of releasing an assertion of title, is *prima facie* for value. *Hill v. Bishop of Exeter*, 2 Taunt. 69.

(b) *Who not considered as.*

A purchaser at an inadequate price. *Doe, d. Parry, v. James*, 16 East, 212.

WAGER.

I. ESSENTIALS.

- (a) *Mutuality*, p. 999.
- (b) *Interest in the subject matter*, p. 999.

II. OF VALID WAGERS.

- (a) *Examples*, p. 999.

III. OF WAGERS VOID OR UNAVAILABLE.

- (a) *General rule*, p. 999.
- (b) *As contrary to morality*, p. 999.
- (c) *As contrary to public policy*, p. 999.
- (d) *In relation to horse-racing*, p. 999.
- (e) *Miscellaneous cases*, p. 999.
- (f) *Whether made available by the admission of having lost it*, p. 999.

WAGER.

IV. OF THE ACTION ON.

- (a) *Declaration*, — *Miscellaneous*, p. 999.
- (b) *Evidence*, — *Miscellaneous*, p. 999.

I. ESSENTIALS.

(a) *Mutuality*.

Is essential; hence, a wager lawful on one side and unlawful on the other, is void. *Clayton v. Jennings*, 2 Blk. 706.

(b) *Interest in the subject matter*.

Is not made essential by stat. 14 Geo. III, c. 48. *Good v. Elliott*, 3 T. R. 693.

II. OF VALID WAGERS.

(a) *Examples*.

1. That a decree in chancery will be reversed. *Jones v. Randall*, Cowp. 37. See Loft. 383;—2. That a waggon, formerly B.'s, but now in A.'s possession, was bought by A. before such a day. *Good v. Elliott*, 3 T. R. 693.

III. OF WAGERS VOID OR UNAVAILABLE.

(a) *General rule*.

Wagers are void which injure third persons, or militate against morality or policy. *Good v. Elliott*, 3 T. R. 695.

(b) *As contrary to morality*.

A wager, giving a direct interest in the death of another, though an enemy; at least if induced by a conversation as to his probable assassination. *Gilbert v. Sykes*, 16 East, 150.

(c) *As contrary to public policy*.

1. A wager between voters on the event of an election. *Allen v. Hearn*, 1 T. R. 56;—2. A wager on the amount of any branch of the revenue. *Atherfold v. Beard*, 2 T. R. 610; *Shirley v. Sankey*, 2 B. & P. 130.

(d) *In relation to horse-racing*.

Where the race is for less than 50 l. *Johnson v. Bann*, 4 T. R. 1.

(e) *Miscellaneous cases*.

Wagers,—1. Concerning the person or sex of another. *Da Costa v. Jones*, Cowp. 729; *Good v. Elliott*, 3 T. R. 699;—2. On a point of law, without an interest,

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Henkin v. Guerres, 12 East, 247;—3. On the mode of playing an illegal game. *Brown v. Leeson*, 2 H. B. 43;—4. To go a given distance in a chaise and pair in a given time. *Ximenes v. Jaques*, 6 T. R. 499.

(f) *Whether made available by the admission of having lost it*.

No. *Atherfold v. Beard*, 2 T. R. 613.

IV. OF THE ACTION ON.

(a) *Declaration on a wager that an agreement was subscribed by A. as it purported*.

See *Mucklefield v. Hepgin*, 1 Anst. 133.

(b) *Evidence on a wager that a decree in chancery would be reversed*.

Proof of proceedings below is unnecessary. *Jones v. Randall*, Cowp. 17.

WALES.

I. RELATIVE TO THE ISSUING OF PROCESS INTO.

(a) *A latitat*, p. 1000.

II. RELATIVE TO THE REMOVAL OF INDICTMENTS FROM.

(a) *From the Quarter Sessions*, p. 1000.

III. RELATIVE TO THE WELCH JUDICATURE ACT.

(a) *Personal actions within, defined*, p. 1000.

(b) *The next adjoining English county defined*, p. 1000.

IV. RELATIVE TO THE PRINCE OF WALES.

(a) *Information by his attorney general*.

(a 1) *Revival of, at his death*, p. 1000.

(a 2) *See INTRUSION*.

(b) *Creditors of, their obligation to resort to the fund, under st. 35 Geo. III, c. 125*, p. 1000.

I. RELATIVE TO THE ISSUING OF PROCESS INTO.

(a) *A latitat.*

Is allowable. *Penry v. Jones*, Dougl. 213; *Lloyd v. Jones*, Ibid, n.

II. RELATIVE TO THE REMOVAL OF INDICTMENTS FROM.

(a) *From the Quarter Sessions.*

Is allowable. *Rex v. Lewis*, 4 Burr. 2456.

III. RELATIVE TO THE WELCH JUDICATURE ACT.

(a) *Personal actions within defined.*

Covenant for not levying a fine, is. *Davis v. Jones*, 1 N. R. 267.

(b) *The next adjoining English county defined.*

Hertfordshire is to South, Salop to North Wales. *Doe, d. Richards, v. Williams*, 2 M. & S. 270.

IV. RELATIVE TO THE PRINCE OF WALES.

(a) *Information by his attorney general.*

(a 1) *Revival of, at his death.*

See *Attorney General, &c. v. Plymouth Corporation*, Wightw. 134.

(b) *Creditors of, their obligation to resort to the fund, under st. 35 Geo. III, c. 125.*

See *Sparkes v. O'Kelly*, 2 N. R. 421; 10 East, 369.

WARDEN OF THE FLEET.

OF FILING A BILL AGAINST, IN VACATION.

Is not allowable. *Crook v. Eyles*, 2 Mars. 49; 6 Taunt. 347; *Stock v. Eyles*, 2 Mars. 54; 6 Taunt. 352.

WARRANTY.

First.

[A] *Of Personal Property.*

I. WHAT CONSIDERED AS.

(a) *An affirmation made at the time of sale, p. 1000.*

II. OF IMPLIED WARRANTY.

(a) *General rules, p. 1001.*

(b) *From the non-observance of the usage of trade in specifying defects, p. 1001.*

III. OF WARRANTY MADE BEFORE SALE.

(a) *Whether obligatory, p. 1001.*

IV. OF DISTINCT WARRANTIES.

(a) *Independant nature of, p. 1001.*

V. OF INCIDENTAL RIGHTS CONNECTED WITH.

(a) *To recover for a horse's keep, — preliminary steps, p. 1001.*

VI. EVIDENCE OF.

(a) *A subsequent acknowledgment, p. 1001.*

VII. FALSEHOOD OF.

(a) *Consequences of, on the vendor's rights, p. 1001.*

(b) *Action for.*

(b 1) *Preliminary steps, p. 1001.*

(b 2) *Declaration, — averment of warranty, and scienter, p. 1001. (And see VENDOR AND PURCHASER.)*

(b 3) *Evidence in, p. 1001.*

(b 4) *Measure of damages in, p. 1001.*

Secondly.

[B] *Of Real Property.*

CONVEYANCE BY RELEASE WITH WARRANTY.

(a) *Subjects of reversionary interest, p. 1001.*

(b) *Its legal effect on an estate tail, p. 1001.*

(c) *Form of, in relation to the addition or omission of heirs, p. 1001.*

First.

[A] *Of Personal Property.*

I. WHAT CONSIDERED AS.

(a) *An affirmation made at the time of sale.*

Is such, if intended, though the vendor

WARRANTY.

is not in possession. *Pasley v. Freeman*, 3 T. R. 57, 58.

II. OF IMPLIED WARRANTY.

(a) General rules.

None arises. *Parkinson v. Lee*, 2 East, 314; *Springwell v. Allen*, 2 East, 448, n.; *Paget v. Wilkinson*, *ibid*; *Dowding v. Mortimer*, *Id.* 448, 449.

(b) From the non-observance of the usage of trade in specifying defects.

Arises. *Jones v. Bowden*, 4 Taunt. 847.

III. OF WARRANTY MADE BEFORE SALE.

(a) Whether obligatory.

Yes, if the sale is bottomed thereon. *Pasley v. Freeman*, 3 T. R. 59, 60.

IV. OF DISTINCT WARRANTIES.

(a) Independant nature of.

A condition annexed to a warranty of soundness, does not extend to one of age. *Buchanan v. Purnshaw*, 2 T. R. 745.

V. OF INCIDENTAL RIGHTS CONNECTED WITH.

(a) To recover for a horse's keep,—preliminary steps.

A tender back must be made on discovering the unsoundness. *Caswell v. Coare*, 1 Taunt. 566.

VI. EVIDENCE OF.

(a) A subsequent acknowledgment.

Is such. *Payne v. Whale*, 3 Smith, 131; 7 East, 274.

VII. FALSEHOOD OF.

(a) Consequences of, on the vendor's rights.

If known to the vendor, the vendee may rescind. *Lewis v. Cosgrave*, 2 Taunt. 2.

(b) Action for.

(b 1) Preliminary steps.

None as notice, or tender back, are necessary: *Fidler v. Starkin*, 1 H. B. 17.

(b 2) Declaration,—averment of warranty and scienter.

1. "Undertook that he could warrant;" aided by verdict. *Button v. Corder*, 7 Taunt. 405; 1 Moore, 109.

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2. Averment of scienter is unnecessary, and therefore surplusage. *Williamson v. Allison*, 2 East, 446; — v. *Purchase*, *Id.* 448.

(b 3) Evidence in.

Must positively prove it false at the time of sale. *Eaves v. Dixon*, 2 Taunt. 343.

(b 4) Measure of damages in.

If the chattel has been returned,—the price given; otherwise, the difference between that and its value. *Caswell v. Coare*, 1 Taunt. 566.

Secondly.

[B] Of Real Property.

CONVEYANCE BY RELEASE WITH WARRANTY.

(a) Subjects of,—reversionary interest.

Is such. *Doc, d. Hutchinson, v. Prestwidge*, 4 M. & S. 178.

(b) Its legal effect on an estate tail.

If to a man and his heirs, it operates as a discontinuance; if heirs are omitted, then only by estoppel against the releasor. *Ibid*.

(c) Form of, in relation to the addition or omission of heirs.

No technical form is requisite. *Ibid*.

WASTE.

I. ACTION OF.

(a) Extent of the damage essential to its maintenance, p. 1002.

II. SUBJECTS OF.

(a) Property excepted out of a demise, p. 1002.

III. ACTION IN THE NATURE OF.

(a) Subjects of,—permissive waste, p. 1002.

(b) Against whom maintainable, p. 1002.

I. ACTION OF.

(a) Extent of the damage essential to its maintenance.

Must amount to 40d. whether the waste

consist in alteration or deterioration. *Harrow School v. Alderton*, 2 B. & P. 86.

II. SUBJECTS OF.

(a) *Property excepted out of a demise.*

Is not the subject of. *Goodright*, d. *Peters v. Vivian*, 8 East, 190.

III. ACTION IN THE NATURE OF.

(a) *Subjects of,—permissive waste.*

Is not the subject of. *Gibson v. Wells*, 1 N. R. 290; *Herne v. Bembow*, 4 Taunt. 764; *Jones v. Hill*, 7 Taunt. 392; 1 Moore, 100.

(b) *Against whom maintainable.*

A tenant for years after expiration of his term. *Kinlyside v. Thornton*, 2 Blk. 1111.

WAY,

(Private.)

I. RELATIVE TO PRIVATE WAYS IN GENERAL.

(a) *Grant of.*

(a 1) *Implied terms of*, p. 1002.

(a 2) *Construction of*, p. 1002.

(b) *Line of*, p. 1002.

(c) *Mode of enjoyment*, p. 1002.

(d) *Repairs of, by whom made*, p. 1002.

(e) *Extinction of.*

(e 1) *By purchasing the land, or parcel thereof*, p. 1002.

(e 2) *Whether by a coequal existing right in the public*, p. 1002.

(f) *Rights of the owner, when impassable*, p. 1002.

(g) *Pleadings.*

(g 1) *Description of the terminus,—as a highway generally*, p. 1002.

II. RELATIVE TO PRIVATE WAYS APPURTENANT.

(a) *Implied grant of*, p. 1003.

(b) *Averment of occupation of the place to which, &c.* p. 1003.

III. RELATIVE TO PRIVATE WAYS OF NECESSITY.

(a) *Creation of*, p. 1003.

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(b) *Grant of,—implied terms.*

(b 1) *For quiet enjoyment*, p. 1003.

(c) *Line of*, p. 1003.

(d) *Revival of*, p. 1003.

(e) *Form of pleading*, p. 1003.

I. RELATIVE TO PRIVATE WAYS IN GENERAL.

(a) *Grant of.*

(a 1) *Implied terms of.*

The grantee of a road for coals, may make a framed waggon way, if necessary. *Senhouse v. Christian*, 1 T. R. 560. See *Gerrard v. Cooke*, 2 N. R. 109.

(a 2) *Construction of.*

"In, through and along", does not import "across" the line. *Senhouse v. Christian*, 1 T. R. 560.

(b) *Line of.*

May be confined by the grantor. *Bullard v. Harrison*, 4 M. & S. 387.

(c) *Mode of enjoyment.*

Cannot be used to go beyond, or short of the termini. *Senhouse v. Christian*, 1 T. R. 569.

(d) *Repairs of, by whom made.*

The grantee. *Taylor v. Whitehead*, Dougl. 745.

(e) *Extinction of.*

(e 1) *By purchasing the land or parcel thereof.*

Is no extinction. *Jackson v. Skilto*, 1 East, 381. *Quare.*

(e 2) *Whether by a coequal existing right in the public.*

No. *Allen v. Ormond*, 8 East, 4.

(f) *Rights of the owner, when impassable.*

Cannot go upon the land adjoining. *Bullard v. Harrison*, 4 M. & S. 387.

(g) *Pleadings.*

(g 1) *Description of the terminus,—as a highway generally.*

Semble, is too general. *Allen v. Ormond*, 8 East, 4.

II. RELATIVE TO PRIVATE WAYS APPURTENANT.

(a) *Implied grant of.*

A demise, "with all ways appurtenant", passes, (c. s.) an occupation way, unless it be shewn that there are ways appurtenant. *Morris v. Edginton*, 3 Taunt. 24.

(b) *Averment of occupation of the place to which, &c.*

1. Seisin, in *demesne*, implies it. *Stott v. Stott*, 16 East, 343.

2. And occupation of part, entitles. *Bertie v. Beaumont*, 16 East, 33.

III. RELATIVE TO PRIVATE WAYS OF NECESSITY.

(a) *Creation of.*

Is impliedly granted or reserved. *Howton v. Frearson*, 8 T. R. 50.

(b) *Grant of,—implied terms.*

(b 1) *For quiet enjoyment.*

Is included in the covenant for quiet enjoyment. *Morris v. Edginton*, 3 Taunt. 24.

(c) *Line of.*

Is that most convenient to the grantee; at least, if that was the one used by grantor. *Morris v. Edginton*, 3 Taunt. 24.

(d) *Revival of.*

See *Buckby v. Coles*, 5 Taunt. 311.

(e) *Form of pleading.*

Is to shew a unity of possession of the two closes, and the manner of their separation. *Bullard v. Harrison*, 4 M. & S. 387.

WEST INDIA DOCKS.

I. THE DOCK ACT (39 GEO. III, c. 69).

(a) *Compensation clause*, 1003.

(b) *Of the charges to which the company are liable, in consideration of the 6s. 8d. per ton*, p. 1003.

(c) *Of goods exempt from charges under sect. 137*, p. 1003.

(d) *Of the delivery of property to the owners under sect. 137*, p. 1003.

II. DOCK WARRANTS.

(a) *On the transfer and indorsement of*, p. 1003.

III. TREASURER.

(a) *Notice of action against*, p. 1003.

I. THE DOCK ACT.

(a) *Compensation clause.*

The standard is the yearly profits made before the act. *Manning v. Commissioners of Compensation*, 9 East, 165.

(b) *Of the charges to which the company are liable in consideration of the 6s. 8d. per ton.*

Ordinary charges only. *Blackett v. Smith*, 12 East, 518.

(c) *Of goods exempt from charges under sect. 137.*

Those only intended for present use. *Blackett v. Smith*, 10 East, 533.

(d) *Of the delivery of property to the owners under sect. 137.*

Must be such as will enable them to carry them by water or land, as they choose. *Harden v. Smith*, 8 East, 16.

II. DOCK WARRANTS.

(a) *On the transfer and indorsement of.*

See *Twinger v. Samuda*, 7 Taunt. 265. 1 Moore, 12; *Lucas v. Dorrien*, 7 Taunt. 278; 1 Moore, 29.

III. TREASURER.

(a) *Notice of action against.*

Is entitled to fourteen days notice under sect. 185. *Wallace v. Smith*, 5 East, 115; 1 Smith, 346.

WHALE FISHERY.

I. IN GENERAL.

(a) *Customs of*, p. 1004.

II. IN THE NORTHERN SEAS.

(a) *Customs of*, p. 1004.

III. IN THE SOUTHERN SEAS.

(a) *Relative to premiums under 28 Geo. III, c. 20*, p. 1004.

IV. OF THE GALLIPOS ISLANDS.

(a) *Customs of*, p. 1004.

I. IN GENERAL.

(a) *Customs of*.

Are binding upon those frequenting the fisheries. *Fennings v. Lord Grenville*, 1 Taunt. 241.

II. IN THE NORTHERN SEAS.

(a) *Customs of*.

The striker's right only continues whilst (but then exclusively) he retains dominion. *Littledale v. Scaith*, 1 Taunt. 243, n.

III. IN THE SOUTHERN SEAS.

(a) *To premiums under 28 Geo. III, c. 20*.

The fourteen months are computed from clearing out; and by lunar months. *Lacon v. Hooper*, 6 T. R. 224.

IV. OF THE GALLIPOS ISLANDS.

(a) *Customs of*.

The striker with a droug, is entitled to share a moiety with the killer. *Fennings v. Lord Grenville*, 1 Taunt. 241.

WHARF AND WHARFINGER.

I. WHARF.

(a) *Situation of*, p. 1004.(b) *Pleadings relative to*, p. 1004.

II. WHARFINGER.

(a) *Lien of*, p. 1004.

I. WHARF.

(a) *Situation of*.

Must be in open places. *Case of London Wharfs*, 1 Blk. 581.

(b) *Pleadings relative to*.

Its original need not be shewn. *Bolt v. Stennett*, 8 T. R. 606.

II. WHARFINGER.

(a) *Lien of*.

1. Is general upon all goods. *Richardson v. Goss*, 3 B. & P. 119.

2. But does not for a general balance, extend to goods transferred to another, after order and before receipt. *Ibid*.

WINDOW LIGHTS.

I. TITLE TO.

(a) *In miscellaneous cases*, p. 1004.

II. IN RELATION TO THE BUILDING ACT, p. 1004.

I. TITLE TO.

(a) *In miscellaneous cases*.

Occupier of one of two houses, built nearly at the same time, and purchased of the same proprietor, may sue the tenant of the other for obstructing his lights, by adding to his own building, however short the plaintiff's previous enjoyment. *Compton v. Richards*, 1 Price, 27.

II. IN RELATION TO THE BUILDING ACT.

A window frame erected on a party-wall, held not to be a common nuisance within 14 Geo. III, c. 78, so as to deprive the owner of it of his right to the windows, which were proved to be antient lights; and even if it was, it could not be obstructed before conviction. *Titterton v. Conyers*, 1 Mars. 140.

WINE.

I. RELATIVE TO THE IMPORTATION OF.

(a) *Form of, and evidence on an information on 24 Geo. III, c. 47, s. 1*, p. 1004.

II. DEALING IN, DEFINED, p. 1005.

III. REMOVAL OF.

(a) *Construction of a permit*, p. 1005.

I. RELATIVE TO THE IMPORTATION OF.

(a) *Form of, and evidence on an information on 24 Geo. III, c. 47, s. 1*.

To state that the wine is liable to forfeiture, upon being imported in casks of less than 25 gallons, without specifically negating the exceptions in 1 Geo. II, c. 17, is good after verdict. And the crown need not prove the quality of the wine. *Attorney General v. Sheriff*, Forrester. 43.

WINE.

II. DEALING IN, DEFINED.

Buying is dealing under 26 Geo. III, c. 59, s. 4. *Re v. Excise Commissioners*, 2 T. R. 381.

III. REMOVAL OF.

(a) Construction of a permit.

"To be in force for one hour after, &c. and two days more for being delivered into," &c.; the two days are computed at twenty-four hours each. *Cooke v. Sholl*, 5 T. R. 255.

WITNESS.

I. ATTENDANCE OF WITNESSES.

(a) In criminal cases.

(a 1) Means of compelling,—on a charge of felony before a magistrate, p. 1008.

(a 2) Subpœna for,—whence issuable, on a trial at the assizes, p. 1008.

II. STANDARD OF INTELLIGENCE.

(a) On a question of hand-writing, p. 1008.

(b) On a question of marriage, p. 1008.

(c) Reference to written documents, p. 1008.

III. INCOMPETENCY FROM INFAMY OF CHARACTER.

(a) Whether occasioned by conviction or judgment, p. 1008.

IV. INCOMPETENCY FROM INTEREST.

(a) General rules.

(a 1) General nature of the interest defined, p. 1008.

(a 2) In relation to the case where the interest is counterbalanced, p. 1008.

(a 3) In relation to the case where the interest is counterbalanced, but not the remedy, p. 1008.

(a 4) In relation to the case where there is a persuasion of interest, p. 1008.

(a 5) In relation to the case where the verdict may

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influence the jury in an action by the witness, p. 1008.

(a 6) In relation to the time at which the interest was acquired, p. 1008.

(b) Incompetency of a party to a written instrument.

(b 1) On an indictment for forgery,—general rule, p. 1008.

(b 2) On an indictment for forgery,—in relation to the question of the validity of an indorsement of the payment of interest, as by the drawer, p. 1008.

(b 3) In a civil action,—incompetency of the drawer of an accommodation bill to prove usury on the transfer, p. 1009.

(b 4) In a civil action,—competency of the drawer of the bill, in an action of money had and received against the acceptor, p. 1009.

(b 5) Competency of the indorser for the drawer sued by the indorsee, p. 1009.

(b 6) Competency of the indorser to prove property in the bill, p. 1009.

(c) Incompetency of parties to a suit.

(c 1) Competency of one adversary, as witness for the other, p. 1009.

(c 2) Incompetency of a co-defendant in assumpsit, after judgment by default against him, as witness for the plaintiff, p. 1009.

(c 3) Incompetency of parishioners on a question of settlement or rate, for their parish,—general rules, p. 1009.

(c 4) Incompetency of parishioners on a question of settlement or rate, for their parish,—of an overseer to prove the custody of a certificate, p. 1000.

- (c 5) *Incompetency of parishioners on a question of settlement or rate, against their parish, p. 1009.*
- (c 6) *Incompetency of governors of the poor on an appeal, p. 1009.*
- (c 7) *Competency of parties whose settlement is in dispute, on an appeal, p. 1009.*
- (d) *Incompetency of a corporator, on a question of approval by the corporation, p. 1009.*
- (e) *Incompetency of a partner.*
 - (e 1) *Of a dormant partner, for his companion (when plaintiff), p. 1009.*
 - (e 2) *To disprove his companion's authority to contract or indorse, p. 1009.*
- (f) *Incompetency of husband and wife.*
 - (f 1) *General rule, p. 1009.*
 - (f 2) *In relation to a woman held out as a wife, p. 1010.*
 - (f 3) *In relation to an action by the wife's trustee, p. 1010.*
 - (f 4) *Competency to prove their own marriage on a question of settlement, p. 1010.*
 - (f 5) *Incompetency in the wife surviving to prove non-access, p. 1010.*
 - (f 6) *Inadmissibility of the wife's declarations suing as executrix, p. 1010.*
 - (f 7) *Admissibility of the wife's declarations in an action on a policy on her life, p. 1010.*
- (g) *Competency of parents on a question of legitimacy, p. 1010.*
- (h) *Competency of an executor to establish the will, p. 1010.*
- (i) *Incompetency of commoners claiming by custom.*
 - (i 1) *To support the right, p. 1010.*
 - (i 2) *To establish the obligation to maintain the adjoining fence, p. 1010.*
- (k) *Incompetency of an underwriter.*
 - (k 1) *General rule, p. 1010.*
 - (k 2) *On a payment to be repaid on the policy proving invalid, p. 1010.*
- (l) *Incompetency of a servant, p. 1010.*
- (m) *Incompetency of a bankrupt.*
 - (m 1) *To support the commission, p. 1010.*
 - (m 2) *To increase or decrease the fund, p. 1010.*
 - (m 3) *For his surety, p. 1010.*
 - (m 4) *In relation to partnerships, p. 1010.*
 - (m 5) *To prove usury, p. 1010.*
- (n) *Competency of a creditor to support a bankruptcy, p. 1011.*
- (o) *Miscellaneous instances of incompetency from interest.*
 - (o 1) *Of the assignor of a debt, p. 1011.*
 - (o 2) *Of a bankrupt discharged from a security, though liable to costs thereon, p. 1011.*
 - (o 3) *Of one who has acted in violation of a custom, p. 1011.*
 - (o 4) *Of a third person, to prove possession in himself, in an ejectment, p. 1011.*
 - (o 5) *Of a master and part-owner, to prove the destination in an action of insurance on goods, p. 1011.*
 - (o 6) *In relation to landlord and tenant, p. 1011.*
 - (o 7) *In relation to the title deeds of property mortgaged twice, p. 1011.*
 - (o 8) *Of the personal representative of one partner against the other, p. 1011.*
 - (o 9) *Of the plaintiff in a bill of injunction on a trial for perjury in the answer thereto, p. 1011.*
 - (o 10) *To prove property in one's self or another,*

under whom one claims,
p. 1011.

- (o 11) *Of the borrower, in an action of usury, p. 1011.*
- (p) *Of the exceptions to the rule, on the subject of incompetency from interest.*
 - (p 1) *From necessity, p. 1011.*
 - (p 2) *Under the Bribery Act, p. 1011.*

V. INCOMPETENCY FROM RELATIVE SITUATION.

- (a) *As attorney.*
 - (a 1) *Rule in relation to confidential communications, p. 1011.*
 - (a 2) *Example of a confidential communication, p. 1012.*
 - (a 3) *Example of a communication not confidential, p. 1012.*
 - (a 4) *Rule in relation to the deposit of writings with, in the course of a cause, p. 1012.*
 - (a 5) *Example where the attorney was examined as to a written notice, p. 1012.*
- (b) *As party to a written instrument, p. 1012.*
- (c) *As attesting witness to a written instrument, p. 1012.*

VI. OF RESTORING THE COMPETENCY OF A WITNESS.

- (a) *By question on the voir dire, p. 1012.*
- (b) *In the case of incompetency from interest.*
 - (b 1) *By release, p. 1012.*
 - (b 2) *By the witness's offer to release, p. 1012.*

VII. ON THE EXAMINATION OF WITNESSES.

- (a) *Mode of proving the incompetency of.*
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XI. OF REMEDIES AGAINST WITNESSES FOR DISOBEYING THE SUBPENA.

(a) By action.

(a 1) *Whether maintainable*, p. 1014.

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I. ATTENDANCE OF WITNESSES.

(a) In criminal cases.

(a 1) *Means of compelling, on a charge of felony before a magistrate.*

On refusal to be bound over, or find sureties, he may commit. *Bennet v. Watson*, 3 M. & S. 1.

(a 2) *Subpœna for, whence issuable,—on a trial at the assizes.*

May issue from the Crown-office. *Res v. Ring*, 8 T. R. 585.

II. STANDARD OF INTELLIGENCE.

(a) On a question of hand-writing.

That derived from correspondence is sufficient. *Gould v. Jones*, 1 Blk. 384.

(b) On a question of marriage.

Any one may prove the party's identity. *Birt v. Barlow*, Dougl. 171.

(c) Reference to written documents.

Is only allowable to revive recollection. *Doe, d. Church, v. Perkins*, 3 T. R. 749; *Kensington v. Inglis*, 8 East, 273.

III. INCOMPETENCY FROM INFAMY OF CHARACTER.

(a) *Whether occasioned by conviction or judgment.*

By judgment only. *Lee v. Gansell*, Loft. 376; Cowp. 3.

IV. INCOMPETENCY FROM INTEREST.

(a) General rules.

(a 1) *General nature of the interest defined.*
A bias. *Walton v. Shelley*, 1 T. R. 301;

or a possibility of advantage will not incapacitate. *Carter v. Pearce*, 1 T. R. 163; but only a direct interest in the event of the suit,—thus, a liability to its costs. *Townsend v. Downing*, 14 East, 565; *Jones v. Brooke*, 4 Taunt. 464; or the privilege of availing himself of the verdict or judgment. *Bent v. Baker*, 3 T. R. 27; which last he has not, where it was obtained, though only in part by his testimony. *Burdon v. Browning*, 1 Taunt. 520; *Res v. Boston*, 4 East, 581; 1 Smith, 202; *Bartlett v. Pickersgill*, 4 East, 577, n.

(a 2) *In relation to the case where the interest is counterbalanced.*

A witness having an interest inclining him to each of the parties, is competent. *Evans v. Williams*, 7 T. R. 481, n.; *Ilderton v. Atkinson*, 7 T. R. 480.

(a 3) *In relation to the case where the interest is counterbalanced, but not the remedy.*

A greater difficulty in enforcing a remedy, occasions a preponderance of interest. *Buckland v. Tankard*, 5 T. R. 66; but see 2 East, 458; 7 T. R. 63; 4 Burr. 2254; 2 East, 561.

(a 4) *In relation to the case where there is a persuasion of interest.*

It incapacitates where its non-existence is not apparent. *Trelawney v. Thomas*, 1 H. B. 303.

(a 5) *In relation to the case where the verdict may influence the jury in an action by the witness.*

The circumstance does not incapacitate. 7 T. R. 63.

(a 6) *In relation to the time at which the interest was acquired.*

If acquired since the suitor had an interest in his testimony, it does not incapacitate. *Bent v. Baker*, 3 T. R. 27.

(b) *Incompetency of a party to a written instrument.*

(b 1) *On an indictment for forgery,—general rule.*

Is competent for the crown, where he can gain nothing by establishing the forgery. *Res v. Treble*, 2 Taunt. 328.

(b 2) *On an indictment for forgery,—in relation to the question of the va-*

lidity of an indorsement of the payment of interest, as by the drawer.

The quasi drawer is incompetent to disprove payment. *Rex v. Crocker*, 2 N.R. 87.

(b 3) In a civil action,—incompetency of the drawer of an accommodation bill to prove usury on the transfer.

He is incompetent. *Jones v. Brooke*, 4 Taunt. 464.

(b 4) In a civil action,—competency of the drawer of the bill in an action of money had and received against the acceptor.

See *Le Sage v. Johnson*, Forrester. 23.

(b 5) Competency of the indorser for the drawer, sued by the indorsee.

Is competent to prove the receipt of money by himself from the drawer to pay, and payment over. *Birt v. Kershaw*, 2 East, 458.

(b 6) Competency of the indorser to prove property in the bill.

Is competent to prove it in either of two persons. *Winlow v. Daniel*, 1 T. R. 298.

(c) Incompetency of parties to a suit.

(c 1) Competency of one adversary, as witness for the other.

One party may be witness for his adversary. *Norden v. Williamson*, 1 Taunt. 378; though he is not compellable. *Rex v. Woburn*, 10 East, 395. See *Baerman v. Radenius*, 7 T. R. 663; *Craib v. D'Aeth*, *Id.* 670, n.

(c 2) Incompetency of a co-defendant in assumpsit, after judgment by default against him, as witness for the plaintiff.

Is incompetent. *Brown v. Brown*, 4 Taunt. 752.

(c 3) Incompetency of parishioners on a question of settlement or rate, for their parish,—general rules.

1. Are only incompetent when actually rated, or paying, or their property rated in the name of another not interested therein. *Rex v. Prosser*, 4 T. R. 17; *Rex v. Little Lumley*, 6 T. R. 157; *Rex v. Gisburn*, 15 East, 57; *Rex v. Kirdford*, 2 East, 559; *Rex v. Killerby*, 10 East, 293.

2. And *semble*, only when produced by their own parish. *Ashburton v. Woodland*, 1 T. R. 261; *Rex v. Hardwick*, 11 East, 590.

3. If the appellants against an order of removal, prove a settlement in a third parish, the rated parishioners thereof cannot disprove it. *Rex v. Terrington*, 15 East, 471.

(c 4) Incompetency of parishioners on a question of settlement or rate, for their parish,—of an overseer to prove the custody of a certificate.

Though rated, he is competent. *Rex v. Netherthong*, 2 M. & S. 337.

(c 5) Incompetency of parishioners on a question of settlement or rate, against their parish.

They are not compellable to answer. *Rex v. Woburn*, 10 East, 403.

(c 6) Incompetency of governors of the poor on an appeal.

If liable in the first instance to costs, are incompetent. *Rex v. St. Mary Magdalen*, 3 East, 7.

(c 7) Competency of parties whose settlement is in dispute on an appeal.

They are competent. *Rex v. Cliviger*, 2 T. R. 267.

(d) Incompetency of a corporator, on a question of approvement by the corporation.

Is incompetent to prove that they left a sufficiency. *Burton v. Hinde*, 5 T. R. 174.

(e) Incompetency of a partner.

(e 1) Of a dormant partner, for his companion (when plaintiff.)

He is competent. *Mawman v. Gillett*, 2 Taunt. 325, n.

(e 2) To disprove his companion's authority to contract or indorse.

He is competent. *Hudson v. Robinson*, 4 M. & S. 475; notwithstanding the other's bankruptcy. *Ridley v. Taylor*, 13 East, 175.

(f) Incompetency of husband and wife.

(f 1) General rule.

They are incompetent either for or against each other. *Bentley v. Cooke*, 2

T. R. 265; *Davis v. Dinwoody*, 4 T. R. 678; a wife therefore cannot criminate her husband, whether in a proceeding directly charging him, or where the question of his guilt arises collaterally. *Rex v. Cliviger*, 2 T. R. 263.

(f 2) *In relation to a woman held out as a wife.*

Quare. Campbell v. Twemlow, 1 Price, 81.

(f 3) *In relation to an action by the wife's trustee.*

A third person under an execution against whom goods, the subject of the action, were seized, cannot prove that they were conveyed in trust. *Davis v. Dinwoody*, 4 T. R. 678.

(f 4) *Competency to prove their own marriage on a question of settlement.*

They are competent. *Rex v. Cliviger*, 2 T. R. 267.

(f 5) *Incompetency in the wife surviving to prove non-access.*

She is incompetent. *Rex v. Luffe*, 8 East, 203; *Rex v. Kea*, 11 East, 132.

(f 6) *Inadmissibility of the wife's declarations suing as executrix.*

They are inadmissible for defendant. *Alban v. Pritchett*, 6 T. R. 680.

(f 7) *Admissibility of the wife's declarations in an action on a policy on her life.*

Touching her health at the time, are admissible against the husband. *Avison v. Lord Kinnaird*, 2 Smith, 286; 6 East, 188.

(g) *Incompetency of parents, on a question of legitimacy.*

May prove illegitimacy. *Rex v. Bramley*, 6 T. R. 330.

(h) *Competency of an executor to establish the will.*

Is competent where he takes nothing, nor is interested in the surplus. *Betteson v. Bromley*, 12 East, 250; *Phipps v. Pitcher*, 2 Mars. 20; 6 Taunt. 220; *Low v. Jolliffe*, 1 Blk. 365; *Goodtitle, d. Fowler, v. Welford*, Dougl. 139.

(i) *Incompetency of commoners claiming by custom.*

(i 1) *To support the right.*

Are incompetent. *Bent v. Baker*, 3 T. R. 33.

(i 2) *To establish the obligation to maintain the adjoining fence.*

Are incompetent. *Anscomb v. Shore*, 1 Taunt. 261.

(k) *Incompetency of an underwriter.*

(k 1) *General rule.*

One underwriter is a witness for the other. *Bent v. Baker*, 3 T. R. 27.

(k 2) *On a payment to be repaid on the policy proving invalid.*

The payer is not a witness for another disputing the loss. *Forrester v. Pigon*, 1 M. & S. 9.

(l) *Incompetency of a servant.*

Is not a witness for his master, sued for his negligence. *Green v. New River Company*, 4 T. R. 589.

(m) *Incompetency of a bankrupt.*

(m 1) *To support the commission.*

Is incompetent, though certificated and having released his share in the surplus. *Cross v. Fox*, 2 H. B. 279, n.; *Flower v. Herbert*, *Ibid.*; *Chapman v. Gardner*, *Id.* 279.

(m 2) *To increase or decrease the fund.*

Is incompetent to increase, but competent to decrease. *Butler v. Cooke*, *Cowp.* 70; *Griffin v. Archer*, 2 Anst. 478.

(m 3) *For his surety.*

Is incompetent when sued by a creditor having elected to come in under the commission. *Towend v. Downing*, 14 East, 565.

(m 4) *In relation to partnerships.*

A co-defendant having proved his bankruptcy is incompetent to prove a previous dissolution of partnership between himself and the solvent defendant, who had closed his case. *Emmett v. Bradley*, 1 Moore, 332.

(m 5) *To prove usury.*

In an action for taking usurious interest on a loan to a bankrupt, he is not a witness for plaintiff, unless he has obtained

his certificate; although defendant has proved the loan under the commission (see now st. 49 Geo. III, c. 121, s. 14,) and although the bankrupt offers to release his claims under the bankruptcy. *Masters v. Drayton*, 2 T. R. 496.

(n) *Competency of a creditor to support a bankruptcy.*

Having sold his chance he is competent. *Granger v. Furlong*, 2 Blk. 1273.

(o) *Miscellaneous instances of incompetency from interest.*

(o 1) *Of the assignor of a debt.*

Is a witness to increase the fund out of which it is payable. *Heath v. Hall*, 4 Taunt. 326.

(o 2) *Of a bankrupt discharged from a security, though liable to costs thereon.*

The liability does not incapacitate. *Brind v. Bacon*, 5 Taunt. 183.

(o 3) *Of one who has acted in violation of a custom.*

Is incompetent to disprove it. *Carpenters' Company v. Hayward*, Dougl. 374.

(o 4) *Of a third person to prove possession in himself in an ejectment.*

Is incompetent. *Doe, d. Jones, v. Wilds*, 1 Mars. 7; 5 Taunt. 183.

(o 5) *Of a master and part-owner to prove the destination in an action of insurance on goods.*

Is a witness for the assured. *De Symonds v. De la Cour*, 2 N. R. 374.

(o 6) *In relation to landlord and tenant.*

1. A tenant in possession is incompetent to support his landlord's title. *Doe, d. Foster, v. Williams*, Cowp. 621.

2. In an action by landlord and tenant, the lessor paramount may prove whether the premises were first demised to the landlord or another. *Bell v. Harwood*, 3 T. R. 308.

(o 7) *In relation to the title deeds of property mortgaged twice.*

One who deposits title deeds with his creditor as a security, and afterwards mortgages to another, may prove notice in the mortgagee. *Plumb v. Fluit*, 2 Anst. 432, n.

(o 8) *Of the personal representative of one partner against the other.*

Is competent. *Burton v. Burchall*, 1 Smith, 197.

(o 9) *Of the plaintiff in a bill of injunction on a trial for perjury, in the answer thereto.*

Is competent. *Rex v. Boston*, 4 East, 572; 1 Smith, 202.

(o 10) *To prove property in one's self, or another under whom one claims.*

1. In an action for goods taken in execution against A, he is incompetent to prove property in himself. *Bland v. Ansley*, 2 N. R. 331.

2. The mortgagee of a chattel who sold it to the defendant on default, is a witness for him sued for it. *Nix v. Cutting*, 4 Taunt. 18.

3. *Vide supra*, (o 4) (o 6)

(o 11) *Of the borrower, in an action of usury.*

Is competent to prove the contract and payment. *Abrahams v. Buns*, 4 Burr. 2251; though he has not repaid the money, *Smith v. Prager*, 7 T. R. 60.

(p) *Of the exceptions to the rule, on the subject of incompetency from interest.*

(p 1) *From necessity.*

An agent may prove a sale by him, though he is to have the surplus beyond a stated sum. *Benjamin v. Porteus*, 2 H. B. 590; or a commission on the price; *Dixon v. Cooper*, 3 Wils. 40.

(p 2) *Under the Bribery Act.*

The discoverer, though a similar suit is pending against himself, is competent. *Heward v. Shipley*, 4 East, 180. And proof of a confession to him by defendant does not of itself incapacitate. *Ibid*.

V. INCOMPETENCY, FROM RELATIVE SITUATION.

(a) *As attorney.*

(a 1) *Rule in relation to confidential communications.*

They must never be revealed. *Wilson v. Rastall*, 4 T. R. 753. But the rule is confined to those made with reference to professional business during the relation of attorney and client. *Ibid*.

- (a 2) *Example of a confidential communication.*

Telling the attorney, before action brought, that he would waive it. *Goodlight v. Bridge*, Loft. 27.

- (a 3) *Example of a communication not confidential.*

That no consideration was given for a note made after an action brought thereon had been compromised. *Cobden v. Kendrick*, 4 T. R. 431.

- (a 4) *Rule in relation to the deposit of writings with, in the course of a cause.*

He is not compellable to produce them. *Rex v. Dixon*, 3 Burr. 1687.

- (a 5) *Example where the attorney was examined as to a written notice.*

Notice received by him, in the course of a cause, to produce papers. *Spenceley v. Schullemburg*, 7 East, 357; 3 Smith, 325.

- (b) *As party to a written instrument.*

May impeach it. *Jordaine v. Lashbrooke*, 7 T. R. 601; over-ruling *Walton v. Shelley*, 1 T. R. 296.

- (c) *As attesting witness to a written instrument.*

Is incompetent to give evidence against the attestation. *Goodtitle, d. Alexander, v. Clayton*, 4 Burr. 2225.

VI. OF RESTORING THE COMPETENCY OF A WITNESS.

- (a) *By question on the voir dire.*

Where the objection arises thereon, it may be removed thereon. *Rex v. Gisburn*, 15 East, 57.

- (b) *In the case of incompetency from interest.*

- (b 1) *By release.*

Is sufficient. *Bent v. Baker*, 3 T. R. 27.

- (b 2) *By the witness's offer to release.*

Is sufficient. *Bent v. Baker*, 3 T. R. 27; *Goodtitle, d. Fowler, v. Welford*, Dougl. 139.

VII. ON THE EXAMINATION OF WITNESSES.

- (a) *Mode of proving the incompetency of.*

- (a 1) *By the witness's admission of infamy.*

Is insufficient. *Rex v. Castle Carcinion*,

8 East, 77; *Rex v. Teale*, 11 East, 309; Loft. 757, 758.

- (b) *Of the privileges of a witness thereon.*

- (b 1) *From his expenses not having been paid.*

May refuse to answer until payment. Nor does his refusal bar his suit for them. *Hallet v. Mears*, 13 East, 15.

- (b 2) *In relation to the question asked.*

May refuse to answer what may, and in his opinion will, expose him to penalties. *Cates v. Hardacre*, 3 Taunt. 424; but not what will merely degrade him. *Rex v. Edwards*, 4 T. R. 440; but see 4 St. Tr. 748; 4 Esp. 225, 242; 8 East, 77.

- (c) *Subject matter of testimony.*

- (c 1) *Admissibility of opinion.*

Is admissible on questions of science. *Folkes v. Chad*, 4 T. R. 498; or of the custom of merchants. *Camden v. Cowley*, 1 Blk. 417. But the case where the opinion of an inspector of franks, that from the appearance of the hand-writing, it was a forgery, was admitted. *Goodtitle, d. Revett, v. Braham*, 4 T. R. 497; was denied in *Cary v. Pitt*, Peake, Evid. Ap.

- (d) *Of the cross examination.*

- (d 1) *Touching collateral irrelevant facts, in order to contradict him.*

Is not allowable. *Spenceley v. De Willot*, 7 East, 108; 3 Smith, 289.

VIII. OF SECONDARY EVIDENCE IN RELATION TO WITNESSES.

- (a) *Admissibility of, where the witness has become insane.*

Is admissible. *Rex v. Eriswell*, 3 T. R. 707.

- (b) *Admissibility of the testimony of a deceased witness.*

- (b 1) *General rule.*

Is admissible between the same parties. *Mayor of Doncaster v. Day*, 3 Taunt. 262.

- (b 2) *Mode of proving.*

May be by judge's notes, or by one who heard it. *Ibid.* But the very words must be sworn to. *Lord Palmerstone's case*, 4 T. R. 290.

- (c) *Of commissions to examine witnesses.*

- (c 1) *Mode of compelling consent to.*

The court will put off the trial. *Furly v. Newnham*, Dougl. 419.

(c 2) *In relation to an information for a forfeited vessel.*

See *Laragoity v. Attorney General*, 2 Price, 172.

(d) *Of depositions.*

(d 1) *Admissibility of, as evidence.*

1. Are not admissible before answer put in, or party is in contempt, unless he had the opportunity of cross-examining. *Cazenove v. Vaughan*, 1 M. & S. 4. See *infra*, (d 2) pl. 1.

2. The depositions of a witness (going abroad) for the crown, in a criminal prosecution, taken with defendant's consent, are admissible. *Rex v. Morphey*, 2 M. & S. 602.

(d 2) *Examples.*

1. Depositions in an old cause admitted, though neither bill, answer, nor decree, could be found. *Bryan v. Booth*, 2 Price, 231. See *supra*, (d 1) pl. 1.

2. It is no objection that the interrogatories were leading ones, where the party might have objected. *Williams v. Williams*, 4 M. & S. 497.

IX. RELATIVE TO THE EXPENSES OF WITNESSES.

(a) *Right to recover back a double payment.*

The loser who pays the witness a second time over, (the winner having already paid) in the taxed costs, cannot recover it back. *Crompton v. Hutton*, 3 Taunt. 230.

X. RELATIVE TO THE COSTS OF BRINGING, OR ENDEAVOURING TO BRING WITNESSES TO THE TRIAL.

(a) *Of the right to costs, where both parties have subpoenaed the same witness.*

The plaintiff, who has paid, is nevertheless entitled to have the payment allowed in costs. *Benson v. Schneider*, 7 Taunt. 337; 1 Moore, 21.

(b) *Of the right to costs, on an examination by commission.*

1. Whether at home or abroad, they are borne by the party obtaining the rule. *Stephens v. Crichton*, 2 East, 259; *Taylor v. Exchange Assurance*, 8 East, 393.

2. Where the rule directs that the deposition of witnesses at X. and Y. be taken, and the direction is to persons at X., the expenses of bringing witnesses

from Y. to X. are allowable. *Muller v. Hartshorne*, 3 B. & P. 556.

(c) *Of the costs of foreign witnesses.*

1. The costs of bringing a necessary witness from abroad, but not of his return, will be allowed. *Cotton v. Witt*, 4 Taunt. 55.

2. Formerly the practice was to allow the costs of a witness brought from beyond sea, only from his coming within jurisdiction of the court. *Hagedorn v. Allnutt*, 3 Taunt. 379.

3. Costs allowed for detaining here a foreign witness, from the suing out of the writ until the trial. *Sturdy v. Andrews*, 4 Taunt. 697.

4. If a person is brought from abroad, for the purpose of being a witness in an action, the court will allow the costs of his detention and subsistence from the time of suing out the writ. *Schimmel v. Lousada*, 4 Taunt. 695.

5. Where a witness is sent for from abroad, *bond fide* for the purpose of the cause and for no other, it is in the discretion of the prothonotary to allow the plaintiff the costs of bringing him over and of sending him back, though he should have been sent for and have arrived before the commencement of the action. *Tremain v. Faith*, 1 Mars. 563; 6 Taunt. 88.

6. A, abroad, furnishes goods to B. at the request of C, who draws bills on B. payable to A, which C. refuses to accept. A. sends for a witness from abroad, for the support of an action against B, pending which action C. arrives in this country. A. then discontinues his action against B, and commences another against C, in which he recovers by means of the witness whom he has brought from abroad. Held, that C. is only liable for the costs of the witness while detained in this country, and not for those of bringing him over, or of sending him back. *Tremain v. Barrett*, 1 Mars. 463; 6 Taunt. 88.

(d) *Of the costs of inquiring after a subscribing witness.*

Will not be allowed. *Laing v. Bowes*, 3 M. & S. 89.

(e) *Mode of computing.*

1. Contingent losses will not be allowed. *Thelluson v. Staples*, Dougl. 438.

2. *Vide supra*, (c)(f) *Miscellaneous cases.*

As to the case where the witnesses are become unnecessary from subsequent pleadings, or a delay has arisen therefrom, see *Hanhorn v. Thomas*, 3 Smith, 361; *Allison v. Noverre*, 1 Price, 381.

XI. OF REMEDIES AGAINST WITNESSES FOR DISOBEYING THE SUBPÆNA.

(a) *By action.*(a 1) *Whether maintainable.*

Yes. Dougl. 561.

(a 2) *Of the declaration therein, for not producing papers.*

To aver—that he could have produced and had no lawful excuse, is sufficient. *Amey v. Long*, 9 East, 473.

(a 3) *Compensation under 5 Eliz. c. 9, how assessed.*

By the court out of which the process issues, and debt lies thereon. *Pearson v. Iles*, Dougl. 556.

(b) *By attachment.*(b 1) *When grantable or not.*

1. Only in a clear case of contempt. *Holme v. Smith*, 1 Mars. 410; 6 Taunt. 9; *Blandford v. De Tastet*, 1 Mars. 42; 5 Taunt. 260. See *Knight v. Palmer*, 3 Smith, 369.

(b 2) *Preliminary steps,—tender of expenses.*

The full amount that will probably be incurred must be tendered. *Fuller v. Prentice*, 1 H. B. 49; and a reasonable time before trial. *Holme v. Smith*, 1 Mars. 410; 6 Taunt. 9.

WOOL.

I. INFORMATIONS RELATIVE TO.

(a) *Trial of, in what county*, p. 1014.(b) *Vide infra*, III., (c) pl. 2. p. 1014.

WOOL.

II. CONVICTIONS RELATIVE TO.

(a) *Appeal from, notice of*, p. 1014.

III. STATUTES RELATIVE TO.

(a) 1 *P. & M. c. 7*, p. 1014.(b) 13 *Geo. I. c. 23, s. 5*, p. 1014.(c) 28 *Geo. III. c. 38*, p. 1014.(d) 43 *Geo. III. c. 153*, p. 1014.

I. INFORMATIONS RELATIVE TO.

(a) *Trial of, in what county.*

In the county whence the jury come. *Dyer v. Hainsworth*, 3 T. R. 611.

(b) *See the Analysis.*

II. CONVICTIONS RELATIVE TO.

(a) *Appeal from, notice of.*

Under 29 *Geo. III. c. 33, s. 7*, need only be given to the prosecutor. *Anon. 2 Smith*, 241.

III. STATUTES RELATIVE TO.

(a) 1 *P. & M. c. 7*.

Does not prohibit inhabitants of a market town, &c. from selling woollen cloth, &c. in other market towns, &c. by retail, and not in open fair. *Lee v. White*, Dougl. 256.

(b) 13 *Geo. I. c. 23, s. 5*.

Does not extend to a demand against clothiers by the owner of a scribbling and carding mill, for work done in teasing, &c. wool. *Rex v. Heywood*, 1 M. & S. 624.

(c) 28 *Geo. III. c. 38*.

1. The words “so as the same may be reduced to and made use of as wool again,” do not refer to each particular before enumerated, but are confined to “coverlids, waddings, and other manufactures.” *Dyer v. Hainsworth*, 3 T. R. 611.

2. Where the prosecution under it originates in an inferior court, judgment must be given there;—where in a superior, the court in bank must pass sentence. *Ibid.*

(d) 43 *Geo. III. c. 153*.

The importation of cotton wool in ships navigated by foreign seamen, is not thereby legalized. *Oliverson v. Loughman*, 4 M. & S. 346.

WRECK.

WRECK.

PROPERTY ON BOARD, WHEN FORFEITED AS.

Not necessarily, because no live animal escape. *Hamilton v. Davis*, 5 Burr. 2732.

WRIT.

(See EXECUTION; ORIGINAL WRIT; PROCESS.)

I. CONTINUATION OF.

- (a) *Its legal effect*, p. 1015.

II. RETURN OF.

- (a) *Its form*, p. 1015.

III. PLEADINGS RELATIVE TO.

- (a) *Averment of its having issued in vacation*, p. 1015. (See PROCESS.)
(b) *Miscellaneous*, p. 1015.

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- (a) *Its legal effect*.

Proceedings are founded on the second writ. *Stanway v. Perry*, 2 B. & P. 157.

II. RETURN OF.

- (a) *Its form*.

The most exact adherence to form is requisite. *Reubel v. Preston*, 5 East, 291.

III. PLEADINGS RELATIVE TO.

- (a) *Averment of its having issued in vacation*.

Is allowable. *Harrington v. Taylor*, 15 East, 378.

- (b) *Miscellaneous*.

To aver the issuing of, between the *essoign* and *quarto die post*, "the court then being at Westminster," is good. *Belk v. Broadbent*, 3 T. R. 183.

IV. RULES OF COURT RELATIVE TO.

- (a) *Touching the indorsement of the time of filing*.

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TO WRITTEN INSTRUMENT. 1015

WRITTEN INSTRUMENT.

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First.

[A] Of Public Writings.

I. OF PUBLIC WRITINGS IN GENERAL.

(a) *Of the proof of.*

(a 1) *By an examined copy.*

Is allowable: thus of an entry in land-tax assessment book. *Rex v. King*, 2 T. R. 234.

(a 2) *By the original.*

Is allowable. *Doe, d. Bennington, v. Hall*, 16 East, 208.

(a 3) *By the original, where a stamp is imposed on the copy.*

Is allowable. *Doe, d. Bennington, v. Hall*, 16 East, 208.

(b) *On the inspection of.*

(b 1) *Court-rolls,—right to inspect.*

Does not depend on the pendency of a suit. *Rex v. Lucas*, 10 East, 235, accord.

Rex v. Allgood, 7 T. R. 746, *contra*. Will be granted on a *prima facie* title, 10 East, *supra*. And to ascertain a right (to cut timber *e. gr.*) which the lord disputes. *Rex v. Tower*, 4 M. & S. 162.

(b 2) *Court rolls,—mode of enforcing inspection.*

A *mandamus* lies. *Rex v. Shelley*, 3 T. R. 141.

(b 3) *Corporation books,—right to inspect.*

1. Corporations, sued by each other, are entitled to. *London Corporation v. Lynn Corporation*, 1 H. B. 206.—2. So, one sued by one corporation, but who claims an exemption as freeman of another, is entitled to inspect the books of the latter. *Lynn Corporation v. Denton*, 1 T. R. 689.—3. But a stranger, sued by a corporation for toll, has no right. *Southampton Corporation v. Graves*, 8 T. R. 590. The right, under 3 Geo. III, c. 15, extends to all books, papers, &c. containing entries of admissions of freemen. *Schuldham v. Bunniss*, Cowp. 192.

(b 4) *Corporation books,—mode of enforcing inspection.*

A rule can only be granted where a cause is pending, and only then of a *limited* inspection; but the rule is of course. For an unlimited inspection, the course is by *mandamus*. *Rex v. Babb*, 3 T. R. 579; *Lynn Corporation v. Denton*, 1 T. R. 689; *Barnstaple Corporation v. Lathey*, 3 T. R. 303.

(b 5) *Corporation books,—extent of the obligation imposed upon the officer by 32 Geo. III, c. 58.*

Does not oblige him to grant inspection of books containing the orders for, and memoranda of, admissions and swearing in. *Davies v. Humphreys*, 3 M. & S. 223.

(b 6) *Corporation books,—parties to an action for refusing an inspection under 32 Geo. III, c. 58.*

If two are bailiffs, both are suable jointly. *Schuldham v. Bunniss*, Cowp. 192.

(b 7) *Custom-house books.*

Inspection refused in a suit concerning the amount of a branch of the revenue between two not interested. *Atherford v. Beard*, 2 T. R. 610.

- (b 8) *Proceedings in bankruptcy,—right of the bankrupt to inspect.*

Is not entitled, previous to trial, of an action disputing the bankruptcy. He must subpoena the clerk of the commission. *Lofft*. 80.

- (b 9) *Proceedings in bankruptcy,—right of a creditor to inspect.*

Is entitled, for purposes connected with. *Lofft*. 80.

- (b 10) *At what period of the cause an application to enforce inspection must be made.*

Not before issue joined. *Hodges v. Atkins*, 2 Blk. 877.

II. OF PUBLIC WRITINGS JUDICIAL.

- (a) *In relation to a court of equity.*

- (a 1) *Bill in equity, evidence of what.*

Only of its own existence, and that its contents were in issue. *Doe, d. Bow-erman, v. Sybourn*, 7 T. R. 2.

- (a 2) *Answer in equity, proof of.*

May be by an examined copy. *Lady Dartmouth v. Roberts*, 16 East, 334.

- (a 3) *Answer in equity, evidence of what.*

Statements as hearsay, are not evidence for deponent on answer produced against him. *Roe, d. Pellatt, v. Ferrars*, 2 B. & P. 542.

- (a 4) *Answer in equity, evidence against whom.*

Deponent, and all claiming under him, though no decree is proved. *Lady Dartmouth v. Roberts*, 16 East, 334.

- (a 5) *Decree in equity, inadmissible without bill and answer.*

Where it recites proceedings in part only. *Dougl.* 580.

- (a 6) *Decree in equity, proof of it's reversal.*

May be by copy. *Jones v. Randall* Cowp. 17.

- (b) *In relation to an ecclesiastical court.*

- (b 1) *Act book, evidence of administration.*

Copy thereof, is so in the first instance. *Elden v. Keddell*, 8 East, 187; *Davis v. Williams*, 13 East, 232; *Ray v. Clark*, Id. 238, n.

- (c) *In relation to a court-martial.*

- (c 1) *Sentence of acquittal, how far conclusive.*

Is not of the illegality of an imprisonment. *Bailey v. Warden*, 4 M. & S. 400.

- (d) *In relation to a court-memor.*

- (d 1) *Court-rolls, evidence of what.*

1. Of the mode of descent, though no instances are shewn. *Roe, d. Beebee, v. Parker*, 5 T. R. 26. 2. Of customs. *Doe, d. Askev, v. Askew*, 10 East, 520. 3. But presentments by homage restricting the lord's right, in respect of parcel of his demesne land, to turn so many cattle only on the waste, not acted on, have no weight against a uniform contrary usage. *Arundell v. Lord Falmouth*, 2 M. & S. 440.

- (e) *In relation to a foreign country.*

- (e 1) *Foreign laws, proof of.*

Must be proved as facts. *Mostyn v. Fabrigas*, Cowp. 174.

- (e 2) *Seal of a foreign court,—proof of.*

Must be by one acquainted with its impression. *Henry v. Adey*, 3 East, 221.

III. OF PUBLIC WRITINGS NOT JUDICIAL.

- (a) *Journals of Parliament.*

- (a 1) *Proof of, by copy.*

Is allowable. *Rex v. Lord George Gordon*, Dougl. 593; *Lofft*. 387, 428.

- (b) *Gazette.*

- (b 1) *Evidence of what.*

Any acts done by, or to, the king, in his regal character. *Rex v. Holt*, 5 T. R. 436.

- (c) *Articles of war.*

- (c 1) *Proof of.*

May be by those purporting to be printed by the king's printer. *Rex v. Holt*, 5 T. R. 436.

- (d) *Excise books,—transcribed from the maltster's specimen.*

- (d 1) *Evidence per se.*

Rex v. Grimwood, 1 Price, 369.

- (e) *Corporation books.*

- (e 1) *Whether evidence for the corporation.*

Not against a stranger. *London Corporation v. Lynn Corporation*, 1 H. B. 214, n.

(f) *Corporate proceedings.*(f 1) *Seal annexed to; how proved.*

The fact that it is such must be proved by one acquainted with their impression; but not that of its annexation. *Dr. Moises v. Dr. Thornton*, 8 T. R. 303.

(g) *A bishop's institution book.*(g 1) *Copy of,—whether admissible to prove a presentation.*

No. *Tillard v. Shebbeare*, 2 Wils. 366.

(h) *East India Company's transfer books.*(h 1) *Proof of, by copy.*

Is allowable. *Dougl.* 593, n.

(i) *Marriage register.*(i 1) *Proof of, by copy.*

Is allowable. *Dougl.* 174; 594, n.

(k) *Customary of a manor.*(k 1) *Whether evidence of a custom.*

One handed down with the other muniments, though not signed, is. *Goodwin v. Spray*, 1 T. R. 466.

(l) *Terrier.*(l 1) *Whether and when evidence.*

Not unless it come from the registry of the diocese, or a copy from the parish registry, if the original is lost. *Atkyns v. Hatton*, 2 Anst. 387. *Contra*, *Miller v. Foster*, 2 Anst. 387, n. K. B.

(m) *Certificate of a British vice consul.*(m 1) *Whether evidence.*

Not of the amount of a sale by him, though authorized by the foreign law. *Waldron v. Coombe*, 3 Taunt. 162.

(n) *Receiver's books.*(n 1) *How determined to be such.*

May be by inspection. *Doe, d. Webber, v. Lord G. Thynne*, 10 East, 206; but evidence that the receivers of an ecclesiastical corporation have, for the last sixty years, kept their books in the same form as certain antient books were kept, is inadmissible to prove that these also were receivers books. *Ibid.*

(o) *Award under an Inclosure Act.*(o 1) *Admissibility of subsequent usage to explain.*

When ambiguous, is admissible in relation to a road. *Wadley v. Bayliss*, 5 Taunt. 752.

(p) *In relation to their custody.*(p 1) *The Herald's Office.*

A book found therein, purporting to be an account of the possessions of a monastery, is not evidence of that fact. *Lygon v. Strutt*, 2 Anst. 601.

(p 2) *Competency of a corporator to produce and depose concerning the custody of the corporation muniments.*

Is competent, when depository. *Anon.* 2 M. & S. 337, 338.

Secondly.

[B] *Of Private Writings.*

I. CONSTRUCTION OF.

(a) *Whether belonging to the court or jury.*

The court. *Mackbeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolseley*, Id. 674.

II. ADMISSIBILITY OF EVIDENCE TO EXPLAIN, VARY OR DISCHARGE.

(a) *General rules.*

Is admissible in explanation only, where there is a latent ambiguity. *Coker v. Guy*, 2 B. & P. 565; *Mercus v. Ansell*, 3 Wils. 275; *Hope v. Atkins*, 1 Price, 143; see *Lofft.* 77; not therefore of an imperfectly worded instrument. *Hallibury v. Nicholson*, 1 Price, 404. Yet, where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, proof of independent collateral facts is admissible. *Rex v. Laindon*, 8 T. R. 379.

(b) *In relation to deeds.*(b 1) *To superadd a condition.*

Is inadmissible. *Lofft.* 457.

(b 2) *To vary the date.*

Is admissible. *Hall v. Cazenove*, 4 East, 477; 1 Smith, 272

(b 3) *To vary the consideration.*

Is admissible. *Rex v. Scammonden*, 3 T. R. 474.

(c) *In relation to wills.*(c 1) *General rule.*

Is inadmissible, unless to clear up a latent ambiguity. *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138; *Driver, d. Frank, v. Frank*, 3 M. & S. 41.

(c 2) *To determine the property.*

Is inadmissible to include other property, where the description is satisfied. *Doe, d. Brown, v. Brown*, 11 East, 441; *Doe, d. Chichester, v. Oxenden*, 3 Taunt. 147; *Doe, d. Tyrrell, v. Lyford*, 4 M. & S. 550.

(c 3) *With reference to the term "last" will.*

Where a codicil confirms "my last will" by date, no latent ambiguity arises from there being a will of a later date. *Lord Walpole v. Lord Cholmondeley*, 7 T. R. 138.

(c 4) *To rebut an implied revocation.*

See *supra*, 352, (f). But no parol declarations in favour of the will are admissible. *Goodtitle, d. Holford, v. Otway*, 2 H. B. 516.

(d) *In relation to letters.*

When written in so dubious a manner as to admit different constructions, the whole transaction may be shewn. *Macbeath v. Haldimand*, 1 T. R. 182.

(e) *In relation to ancient writings.*

Is admissible to explain ambiguities, but not to control express provisions, though it may general ones. *Rex v. Varlo*, Cowp. 248; *Gape v. Handley*, 3 T. R. 288, n.; *Rex v. Bellringer*, 4 T. R. 810; *Withnell v. Gartham*, 6 T. R. 388; *Rex v. Osbourne*, 4 East, 327; *Weld v. Hornby*, 7 East, 199; *Stammers v. Dixon*, 7 East, 200; 3 Smith, 261; *Tewkesbury Corporation v. Bricknell*, 2 Taunt. 120; *Rex v. Mayor of St. Albans*, 12 East, 559; *Rex v. Stratford upon Avon Corporation*, 14 East, 348; *Rex v. Chester Corporation*, 1 M. & S. 101.

(f) *Miscellaneous instances.*

(f 1) *Devises.*

1. Expressions, at the time of devising, of an intention to devise to A, described as B, are, as corroborative, admissible. *Thomas, d. Evans, v. Thomas*, 6 T. R. 671.

2. Evidence that testator, on executing a second will, inquired whether it was similar to the first, and was answered yes, is admissible to shew fraud. *Doe, d. Small, v. Allen*, 8 T. R. 147.

3. On the question, whether parcel or not, reputation of its having belonged to

A, and been purchased of him by testator, though corroborated, is inadmissible. *Doe, d. Didsbury, v. Thomas*, 14 East, 323.

4. Devise of all his estates in trust for his son for life, with remainder over in strict settlement, &c. revoked "so far as related to his estate at L, in W. and H. and B. in K. Court divided whether evidence of intention to include under "at H," lands in other parishes purchased all under one contract. *Whitbread v. May*, 2 B. & P. 593.

5. Devise of "Estate at C.;" evidence of intention to include lands at D, inadmissible. *Doe, d. Browne, v. Greening*, 3 M. & S. 171; *Doe, d. Chichester, v. Oxenden*, 3 Taunt. 147; *Doe, d. Tyrrell, v. Lyford*, 4 M. & S. 550.

(f 2) *Leases.*

1. Evidence that Michaelmas means Old Michaelmas, is inadmissible. *Doe, d. Spicer, v. Lea*, 11 East, 312.

2. Whether evidence of intention to include in a subsequent demise, a covenant for renewing the lease, is admissible. See *Cooke v. Booth*, Cowp. 819; 7 East, 237; 2 N. R. 449.

(f 3) *Policies.*

1. The general rule is the same as with other instruments. *Weston v. Emes*, 1 Taunt. 115.

2. Evidence of a communication to the insurer, is admissible to define what otherwise is undefinable. *Urquhart v. Barnard*, 1 Taunt. 450.

(f 4) *Bill of lading.*

Evidence that "last" imports foreign, not English measure, is inadmissible. *Moller v. Living*, 4 Taunt. 102.

(f 5) *Sales by auction.*

The auctioneer's declarations, where there are printed conditions, are inadmissible. *Gunnis v. Eshart*, 1 H. B. 289; *Powell v. Edmunds*, 12 East, 6.

(f 6) *Power of attorney.*

Evidence of usage at the Navy office, is inadmissible to enlarge its terms. *Hogg v. Snaith*, 1 Taunt. 347.

(f 7) *Fines.*

Evidence is admissible to rebut the

resulting use to the conusor. *Roe, d Roach, v. Popham*, Dougl. 25.

(f 8) *Trusts.*

Evidence is admissible to shew that one, *primâ facie* a trustee, takes for his own benefit. *Langfelde, d. Banton, v. Hodges*, Loft. 230.

(f 9) *Notes issued by a corporation.*

Semble, evidence that they were issued for another than the authorized purpose, is admissible. *Slark v. Highgate Archway Company*, 5 Taunt. 792.

(f 10) *Deed executed by mark, abroad.*

Evidence to shew that deeds are executed in that manner, is admissible. *Adam v. Kerr*, 1 B. & P. 360.

III. PROOF OF, IN GENERAL, OR WHEN NOT ATTESTED.

(a) *By a duplicate original.*

(a 1) *In the case of an attorney's bill.*

Is admissible. *Anderson v. May*, 2 B. & P. 237.

(a 2) *In the case of a notice or demand.*

Is admissible. *Jory v. Orchard*, 2 B. & P. 39.

(b) *By a counterpart.*

The averment that "by an indenture" may be proved by the part executed by defendant. *Burleigh v. Stibbs*, 5 T. R. 465.

(c) *On production by the adverse party.*

1. In general, where it purports to belong to him, it is admissible for him, without proof of execution, or its custody, provided it is of sufficient age, and in other respects evidence. *Rex v. Ryton*, 5 T. R. 259.

2. When produced by a party thereto on notice, and who claims an estate under it, it is evidence for his adversary, without proof of execution, that he took that specific estate. *Pearce v. Hooper*, 3 Taunt. 60.

(d) *When thirty years old.*

Is admissible without further proof. *Rex v. Farrington*, 2 T. R. 466; *Mackery v. Newbolt*, 4 T. R. 709, n.; unless a bond, when payment of interest, or other mark of authenticity, must appear. *Forbes v. Wale*, 1 Blk. 532.

(e) *Of secondary evidence,—and first, general rules.*

(e 1) *On refusal to produce after notice.*

Is admissible, whether in criminal or civil suits. *Attorney General v. Le Merchant*, 2 T. R. 201, n.; *Rex v. Watson*, Id. 199.

(e 2) *Notice to produce, when unnecessary.*

When from the nature of the proceeding, the one party is aware that the other means to charge him with the possession of it. *How v. Hall*, 14 East, 274; *Scott v. Jones*, 4 Taunt. 865; *Butcher v. Jarratt*, 3 B. & P. 143.

(e 3) *Notice to produce, to whom given.*

To the suitor's attorney, even in criminal suits. *Attorney General v. Le Merchant*, 2 T. R. 201, n.; *Cates v. Winter*, 3 T. R. 306.

(e 4) *After an unsuccessful search,—search defined.*

That no place or person can be discovered, dispenses with search. *Rex v. Morton*, 4 M. & S. 48.

(e 5) *By comparison of hands.*

Is admissible where from lapse of time no better evidence is attainable. *Brune v. Rawlins*, 7 East, 282, n.; *Morewood v. Wood*, 14 East, 328.

(f) *By secondary evidence,—secondly, particular instances.*

(f 1) *A deed of apprenticeship.*

1. A deed consisted of two parts, of which one was destroyed, and the person having the other, had said he could not find it. He was not subpœnaed. Held, that parol evidence was inadmissible. *Rex v. Castleton*, 6 T. R. 236.

2. An apprenticeship deed consisted of one part, in possession of the apprentice, who, on application shortly before he died, said he had burnt it: the executrix of the master, said she knew nothing about it. Secondary evidence was held admissible without further search. *Rex v. Morton*, 4 M. & S. 48.

(f 2) *A license from the crown.*

When lost, its contents must be proved by the registry at the Secretary of State's office. *Rhind v. Wilkinson*, 2 Taunt. 237.

(f 3) *As against the assignee of an estate.*

Documents relating thereto are presumed to have been handed over to him; hence, secondary evidence is admissible after notice. *Goodtitle, d. Luxmore, v. Saville*, 16 East, 91, n.

IV. PROOF OF, WHEN ATTESTED.

(a) *General rule.*

The rule that execution of an attested instrument must be proved by the subscribing witness, if he can be produced and examined, admits no exceptions. *Doe, d. Sykes, v. Durnford*, 2 M. & S. 62; *Rex v. Harringworth*, 4 M. & S. 350.

(b) *On production by the suitor.*

When made pursuant to notice, and he is a party thereto, and claims a beneficial estate under it, the other side need not call the subscribing witness. *Gordon v. Secretan*, 8 East, 548; *Pearce v. Hooper*, 3 Taunt. 62.

(c) *By secondary evidence,—and first, general rules.*

(c 1) *Acknowledgment of obligor.*

Is insufficient. *Abbot v. Plumbé*, Dougl. 216; though made in an answer in chancery. *Call v. Dunning*, 4 East, 53.

(c 2) *Deposition of witness on interrogatories, after acknowledgment by obligor.*

Is inadmissible if taken (here on the ground of sickness) at the instance of the obligee only. *Jones v. Brewer*, 4 Taunt. 46.

(c 3) *Where the witness refuses to testify.*

The execution may be proved by others, or his testimony disproved. *Rex v. Harringworth*, 4 M. & S. 353; *Talbot v. Hodson*, 2 Mars. 527; 7 Taunt. 251.

(c 4) *Where the witness is unable to attend from sickness.*

Still his attendance cannot be dispensed with. *Jones v. Brewer*, 4 Taunt. 46.

(c 5) *Where the witness is abroad, or out of the jurisdiction.*

Proof of his hand-writing is sufficient. *Prince v. Blackburne*, 2 East, 250; *Adam v. Kerr*, 1 B. & P. 361; *Barnes v. Trompowsky*, 7 T. R. 265; *Wallis v. Delancey*, Id. 266, n.; *Coghlan v. Williamson*, Dougl. 93.

(c 6) *Where the witness cannot be found.*

Secondary evidence will do; but *semble*, where grounds are shewn for suspecting that he is purposely kept out of the way, proof of stricter search is requisite. *Crosby v. Percy*, 1 Taunt. 364.

(c 7) *Where the witness was and is interested.*

Secondary evidence will do. *Swire v. Bell*, 5 T. R. 371.

(c 8) *Rule in the case of a warrant of attorney.*

To dispense with the deposition of the attesting witness, the nature of the search, where he had been last seen or known to reside, and when he was last heard of, must be stated. *Waring v. Bowles*, 4 Taunt. 132.

(c 9) *Hand-writing of the witness,—evidence of what.*

The sealing, delivery, and party's hand-writing. *Prince v. Blackburne*, 2 East, 250; *Adam v. Kerr*, 1 B. & P. 360; *Wallis v. Delancey*, 7 T. R. 266, n.; *contra*.

(c 10) *Rule in the case where there are two attesting witnesses.*

Where one is dead, the other absent, proof of either's hand-writing will do. *Adam v. Kerr*, 1 B. & P. 360.

(d) *By secondary evidence,—secondly, particular instances.*

1. Is admissible, on proof of inquiry after witness at the residence of the obligor and obligee, without any intelligence of such a person being obtained. *Cunliffe v. Sefton*, 2 East, 183.

2. So, if on inquiry at the Admiralty it appears that he is serving in the Navy, but where cannot be ascertained. *Parker v. Hoskins*, 2 Taunt. 223.

3. So, notwithstanding the vessel in which he sailed put back just before trial. *Ward v. Wells*, 1 Taunt. 461.

V. OBLITERATIONS AND ALTERATIONS IN, THE CONSEQUENCES.

(a) *General rules.*

1. A material alteration, with consent of parties, vitiates. *French v. Patten*, 9 East, 351:—2. *Semble*, a letter, a considerable part of which appears obliterated, is not evidence. 1 Anst. 227.

(b) *Example.*

Insertion by a stranger of "hundred" between "one," and "pounds" in the condition of a bond, meeting the obvious sense, is immaterial. *Wagh v. Russell*, 1 Mars. 311; 5 Taunt. 707.

VI. CANCELLATION OF.

(a) *Intention, an essential to.*

Perrott v. Perrott, 14 East, 423.

(b) *Proof that the intention was wanting.*

May be, by proof of its having proceeded on a mistake in law. *Ibid.*

(c) *Obligation thereon to deliver up the instrument to the party bound.*

Arises where, by its terms, the duty still continues. *Rex v. Harberton*, 1 T. R. 139.

VII. OF THE PREFERENCE BETWEEN VERBAL AND WRITTEN, AND PRINTED AND WRITTEN INSTRUMENTS HAVING REFERENCE TO THE SAME SUBJECT MATTER.

(a) *General rules.*

1. Where terms of agreement are reduced to writing, the writing is the only efficient medium. *Rolleston v. Hibbert*, 3 T. R. 406; *Hodges v. Drakeford*, 1 N. R. 270; *Preston v. Merceau*, 2 Blk. 1249.

2. Where printed and written stipulations are at variance, the written shall be preferred. *Dewell v. Moxon*, 1 Taunt. 391.

(b) *Where the periods in each are different.*

An agreement by parol, though in terms professing to be a substitution for one under seal, in respect of the same subject matter, is nevertheless valid, if it is to take effect before the time limited in the other. *White v. Parkin*, 12 East, 578.

VIII. ON THE INSPECTION AND PRODUCTION OF PRIVATE WRITINGS.

(a) *General rule.*

An adverse claimant having no interest in title deeds, has no right to inspect them. *Talbot v. Villebois*, 3 T. R. 142.

(b) *Where the deed, on which the plaintiff is suing, consists of one part only.*

If, in defendant's possession, the court will compel him to permit the plaintiff to copy it. *Blakey v. Porter*, 1 Taunt. 386. Though he is seeking to discover a defect therein. *King v. King*, 4 Taunt. 666.

(c) *Where the deed, on which the plaintiff is suing, consists of two parts, and his one is lost.*

The court will not compel the production of the defendant's. *Street v. Brown*, 1 Mars. 610; 6 Taunt. 302.

(d) *Where the purpose is to have the writing stamped.*

Either party to a suit is compellable to produce it. *Bateman v. Phillips*, 4 Taunt. 157.

(e) *Where there is an imputation of forgery.*

The plaintiff (the original party,) is not compellable to produce the instrument on which he is suing, for inspection, on suspicion that it is forged. *Chetwind v. Marneil*, 1 B. & P. 271.

(f) *In actions on policies.*

The underwriter may have a rule for the inspection of all letters and papers directing the insurance. *Whitter v. Cazalet*, 2 T. R. 683.

(g) *In cases of bankruptcy.*

In trover by bankrupt assignees, the question being, whether the bankrupt sold the goods, the defendant had leave to inspect his sale-books. *Ibid.*

(h) *In the case of pleading letters patent not enrolled.*

On affidavit of the fact, the other side will be ordered a copy. *Rex v. Amery*, 1 T. R. 149.

(i) *Judge's order for inspection is satisfied by giving extracts.*

Clifford v. Taylor, 1 Taunt. 167.

(k) *Duty of a witness subpoenaed duces tecum.*

He should always have them ready for production. *Amey v. Long*, 9 East, 485.

IX. ON THE CUSTODY OF ANTIENT
PRIVATE WRITINGS.

(a) *The British Museum.*

An old grant to a priory, brought from the Cottonian MSS. in the British Museum, was rejected as evidence, as it was not shewn that the possession of the grant was connected with any persons interested in the estate. *Swinerton v. Lord Stafford*, 3 Taunt. 91.

(b) *The Bodleian Library.*

A grant to an abbey, contained in a MSS. entitled "*Secretum Abbatis*," in the Bodleian Library at Oxford, rejected, the custody not being the proper one. *Michell v. Rabbets*, 3 Taunt. 91.

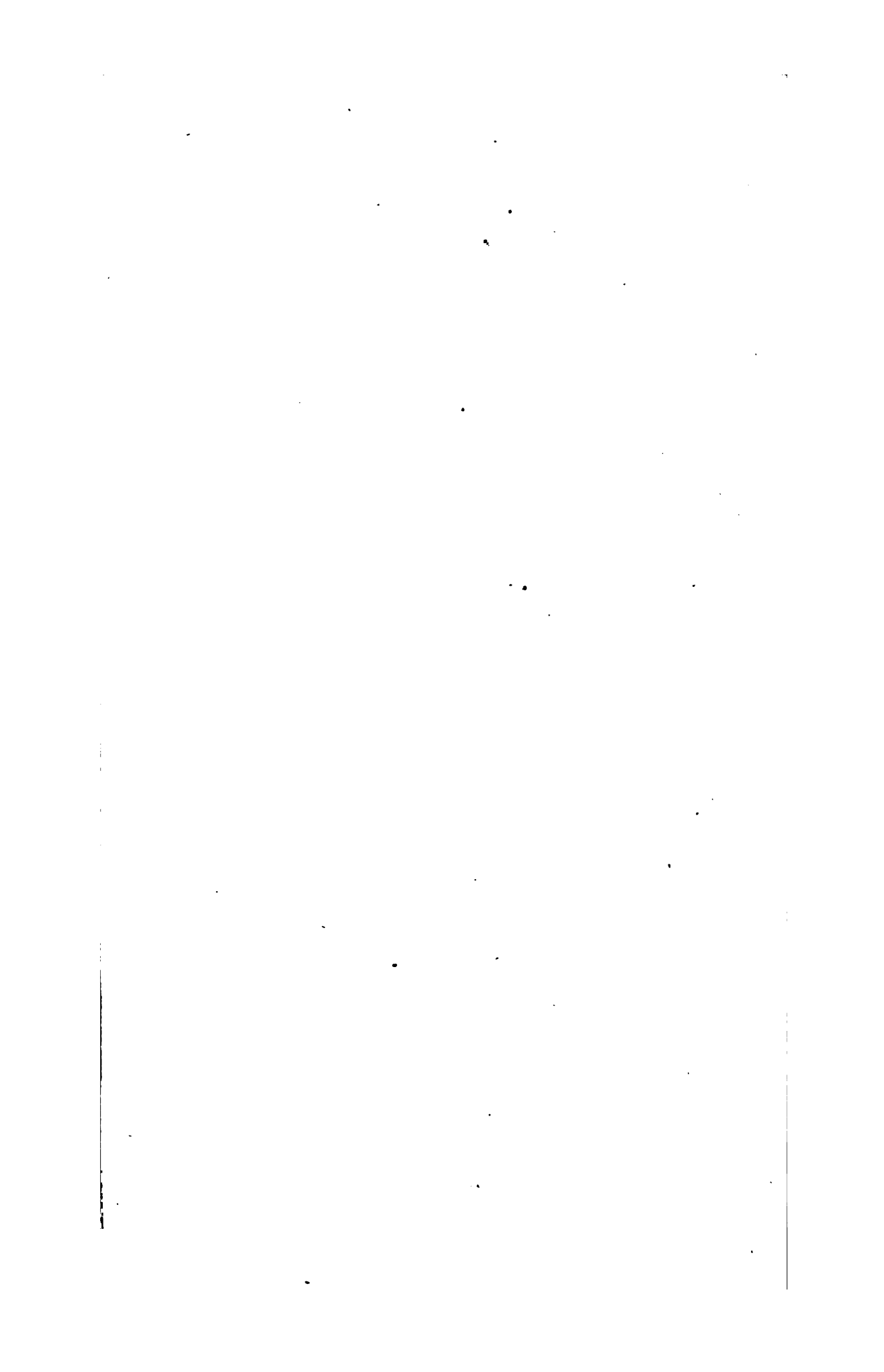
X. MISCELLANEOUS.

(a) *Obligation to prove the indorsement of a registration in Ireland, on a deed executed there.*

It need not be proved. *Pyne v. Dor*, 1 T. R. 55.

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CANAL ACT.

Construction of. See *Proprietors of Same v. Bradley*, 7 East, 368.



- (b 4) *Attempt to influence the jury*, p. 675.
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II. IN CRIMINAL CASES.

- (a) *When granted or refused.*
 - (a 1) *General rules*, p. 678.
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I. IN CIVIL CASES.

- (a) *When granted or refused.*
 - (a 1) *General rules.*

1. An application for a new trial is to the discretion of the court, who will exercise it in such a manner as will best answer the ends of justice. If they see that those ends have been fulfilled, they will not grant a new trial upon a technical objection, such as a misdirection of the judge. *Edmonson v. Machell*, 2 T. R. 4; 4 Lofft. 521.

2. On applying for a new trial, the only question is, whether, under all the circumstances, the verdict be or be not according to justice, without regarding any slip which the judge may have made in his direction. *Estwick v. Cailland*, 5 T. R. 425; Lofft. 521.

3. A new trial will be refused, unless the objection on which, &c. either was, or could not have been made at the trial. *Vernon v. Hankey*, 2 T. R. 153; *Rogers v. Stevens*, 2 T. R. 713; *Petrie v. White*, 3 T. R. 8; *Horford v. Wilson*, 1 Taunt. 12; *Halliwell v. Trapples*, 2 Taunt. 55; *Astley v. Ray*, Id. 217, n. (a).

4. Where the question is involved in great doubt and obscurity, is of great value, and binds the right for ever, the court will grant a new trial, where in an ordinary case they would refuse it. *Swinerton v. Marquis of Stafford*, 3 Taunt. 91.

5. A new trial will not be granted in a hard case. *Reaveley v. Mainwairing*, 3 Burr. 1306.

6. After a full trial by a competent jury, if no fresh light can be thrown in, a new trial shall not be granted. *Camden v. Cowley*, 1 Blk. 418.

7. A new trial will not be granted where the court see that the issue of the

second trial will be similar to that of the first. *Watkins v. Towers*, 2 T.R. 275.

8. Where a verdict is consonant to equity, a new trial will not be granted, unless on a legal objection; not, therefore, on the ground that the facts proved did not sufficiently warrant the inference drawn by the jury. *Wilkinson v. Payne*, 4 T.R. 459.

9. A verdict against evidence will not be set aside, and a new trial granted, where the damages do not exceed 5*l*. *Roberts v. Karr*, 1 Taunt. 495. And see *Marsh v. Bower*, 2 Blk. 851.

10. A nonsuit will not be set aside, on the ground that the case should have been left to the jury, unless that was requested at the trial. *Kindred v. Bagg*, 1 Taunt. 10.

11. A new trial will not be granted for the improper rejection of a witness which, in the event, proved unimportant. *Edwards v. Evans*, 3 East, 451.

12. An application for a new trial, because evidence was improperly admitted, will be refused, where the other evidence adduced was sufficient to warrant the verdict. *Horford v. Wilson*, 1 Taunt. 12.

13. If, on the judge stating his opinion to the jury, the plaintiff elects to be nonsuited, he cannot demand a new trial, on the ground that the direction was erroneous. *Butler v. Dorant*, 3 Taunt. 229.

14. A new trial will not be granted because the judge differed from the jury as to the preponderance of the evidence, where on a former trial the verdict was the same. *Swinerton v. Marquis of Stafford*, 3 Taunt. 232.

15. Where a verdict is consonant to the equity of the case, a new trial will not be granted on a point of law which was not reserved. *Cox v. Kitchen*, 1 B. & P. 338.

16. No motion for a new trial on a point abandoned at the trial. *Robinson v. Cook*, 6 Taunt. 336.

17. The court will order a new trial on questions deciding important rights, where the judge expressed an opinion on the trial, contrary to the verdict, although he afterwards report that he was not dissatisfied with the finding of the jury. *The Earl of Mountedgecombe v. Symons*, 1 Price, 278.

18. Where there are two contrary verdicts, and the latter is satisfactory to the court, the losing party is not entitled by

any rule or practice to a third trial. *Parker v. Ansell*, 2 Blk. 963.

19. A new trial may be granted after two concurring verdicts. *Goodwin v. Gibbons*, 4 Burr. 2108.

(a 2) *In penal actions.*

1. After verdict for defendant in a penal action, a new trial shall never be granted. *Fonereau v. —*, 3 Wils. 59.

2. In a penal action, where the jury having had the case fairly stated to them, find a verdict for the defendant, however mistaken, the court will not grant a new trial. *Secus*, where they have been misdirected. *Wilson v. Rastall*, 4 T.R. 753; *Calcraft v. Gibbs*, 5 T.R. 19.

3. A verdict for the defendant in a penal action will not be set aside, because against evidence. *Brook v. Middleton*, 10 East, 268.

(a 3) *In ejectment.*

A new trial may be granted in ejectment. *Goodtitle, d. Alexander, v. Clayton*, 4 Burr. 2224; *Clymer v. Littler*, 1 Blk. 348.

(a 4) *On an issue from a court of equity.*

Where the court of Chancery directs an action at law, even in cases where such action could not be maintained without its direction, as where the defendant therein is a certificated bankrupt, it does not consider the action as tried, unless the court at law is satisfied with the verdict. Until that event, therefore, such court has full dominion over the suit, and may direct a new trial, if dissatisfied with the verdict. *Carstairs v. Steyn*, 4 M. & S. 192.

(a 5) *Miscellaneous instances in which it has been granted.*

1. A new trial was granted, although there was evidence on both sides, because all the witnesses subscribing to a release were not called and examined. *Norris v. Freeman*, 3 Wils. 38.

2. In *assumpsit*, by an executor for goods sold and delivered, the delivery was proved by one witness, but he also swore that he was partner with the deceased, notwithstanding, from a paper written by himself, the debt appeared to have been due only to the deceased; the jury found a verdict for the plaintiff for 8*l*. 14*s*., and notwithstanding the smallness of the

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